Case No. 82-2036

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

Ralph Roger Bergman,

Petitioner,

V.

United States of America,

Respondent.

APPENDIX
TO
PETITION FOR A WRIT OF CERTIORARY

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APPENDIX A

OPINION OF THE UNITED STATES COURT OF CLAIMS
ISSUED JUNE 16, 1982

IN THE UNITED STATES COURT OF CLAIMS

TRIAL DIVISION

No. 84-78

(Filed: June 16, 1982)

RALPH ROGER BERGMAN	)Civilian Pay; reduction
	)in force;
V.	)limitation of actions;
	)procedural
	)error; harmless error,
THE UNITED STATES	)employee
	)qualifications,"bumping"
	)rights;
	)involuntary retirement

Ralph Roger Bergman, pro se.

Beacham O. Brooker, Jr., with whom was Assistant Assistant General J. Paul McGrath, for defendant.

OPINION (see footnote)

SETO, Trial Judge: The plaintiff in this civilian pay case, Ralph Roger Bergman, is a former employee of the Department of Commerce laboratories in Boulder, Colorado. During the period of his employment with the Department of Commerce, plaintiff was twice separated in reduction in force (RIF) proceedings, the first such separation occurring in February 1968, and the second in August 1973. After reinstatement in August 1975, plaintiff retired for disability on March 16, 1977.

(Footnote): The trial judge's recommended

decision and conclusion of law are submitted in accordance with Rule 134(h).

Plaintiff, appearing pro se, challenges the validity of each RIF separation on multiple grounds, and contends that the former Civil Service Commission erred in its determinations regarding each RIF separation. Plaintiff further contends that his disability retirement in March 1977 was coerced and involuntary, entitling him to additional relief. Pursuant to the Tucker Act, 28 U.S.C. Section 1491 (1976 & Supp. III 1979) and the Back Pay Act, 5 U.S.C. Section 5596 (1976 and Supp. IV 1980), plaintiff seeks reinstatement, correction of his personnel records, back pay, and other benefits.

In the court's opinion, plaintiff is not entitled to recovery. All claims arising from the 1968 RIF separation are barred by the 6-year statute of limitations, 28 U.S.C. Section 2501 (1976). In addition, the final decision of the Appeals Review Board (ARB) of the former Civil Service Commission (CSC), which afforded plaintiff relief for alleged errors related to the 1973 RIF, was neither arbitrary, capricious, nor unsupported by substantial evidence. Moreover, plaintiff's additional contentions arising from the 1973 RIF, his claims for relief based on alleged misclassification, and his allegation that his retirement was involuntary, are all without merit.

Accordingly, it is recommended that plaintiff's petition be dismissed.

I. The 1968 Reduction in Force

Plaintiff commenced employment with defendant in October 1962, in the laboratories of the Radio Systems Division of the National Bureau of Standards, Department of Commerce, located in Boulder, Colorado. Plaintiff's initial position was titled "Physicist, GS-1310-5."

During the period 1962-1968, plaintiff was successively promoted to the GS-11 grade level, assuming a series of positions in the physics grade series. These positions carried various titles, including "Physicist (General)," "Physicist (Optics)," and "Physicist (Physics of the Atmosphere)." Although plaintiff's undergraduate degree had been earned in the field of physics, plaintiff's job tasks in these positions frequently required knowledge of engineering principles.

In 1967, plaintiff was advised by a supervisor, Robert Lawrence, that plaintiff would not be able to advance from the GS-11 grade level as a physicist. Mr. Lawrence suggested that plaintiff attempt to obtain a change in classification from physics to engineering. However, the personnel department of the agency (now known as the Environmental Sciences Services Administration, or ESSA), refused plaintiff's request for a classification change.

On February 12, 1968, plaintiff's position was abolished, and plaintiff was separated from his competitive level by RIF.(footnote 1) The agency did not permit plaintiff to displace the incumbents of available engineering positions, citing plaintiff's apparent lack of formal engineering qualifications. In addition, plaintiff was not permitted to displace the occupants of physicist positions within plaintiff's competitive level, since the agency had determined that such displacement would have resulted in an undue interruption of the work activity of each such position. In lieu of separation, plaintiff was offered the position of "Physicist, GS-1310-5,"" which plaintiff declined.

(Here is Footnote 1): "Competitive level," for RIF purposes, is defined by applicable regulations as a group of positions "* * * in the same grade or occupational level which are sufficiently alike in qualification requirements, duties,

responsibilities, pay schedules, and working conditions, so that an agency readily may assign the incumbent of any one position to any of the other positions without changing the terms of his appointment or unduly interrupting the work program" 5 C.F.R. 351.403(a) (1973).

(Footnote 1 continues) Employees released from their competitive level in a RIF may exercise displacement rights in two ways. The first method, known as "bumping," involves displacement of employees in lower retention subgroups who occupy positions for which the employee is qualified. See p. , infra. The second method, known as "retreating," involves displacement of employees in the same retention subgroup who occupy positions from which the retreating employee was promoted, positions "skipped over" in a promotion or substantially similar positions. Employees are organized within retention subgroups on the basis of veteran's preference, tenure status, and length of service. See Federal Personnel Manual (FPM), Chapter 351, subchapters 5-2, 7-4, and 7-5.(This is the end of footnote 1)

Plaintiff appealed the agency's determination to the Denver Regional office of the CSC, contending that he possessed the requisite qualifications for engineering positions encumbered by employees classified in lower retention subgroups. At the time of the 1968 RIF, plaintiff was classified in retention subgroup IB. Plaintiff, not being a veteran, did not qualify for veteran's preference, and therefore was not classified in retention subgroup IA.

By letter dated March 29, 1968, the CSC, Denver Region, denied plaintiff's appeal, citing plaintiff's lack of formal education and experience in the field of engineering. Plaintiff's subsequent appeal to the Board of Appeals and Review (BAR) was rejected, since plaintiff had failed to file an appeal within the limit of 15 days after receipt of the decision of

the Denver Regional Office.

Plaintiff now alleges that the 1968 RIF was an arbitrary and capricious personnel action. In support of this allegation, plaintiff contends that defendant failed to accurately record the nature and extent of plaintiff's engineering duties in plaintiff's official personnel file, erroneously preventing plaintiff from being properly considered for various engineering positions to which he was alledgedly entitled.

However, it is clear that the 6-year statute of limitations, 25 U.S.C. Section 2501 (1976), bars any consideration by this court of the merits of plaintiff's allegations concerning the 1968 RIF. Plaintiff's cause of action arising from this personnel action, assuming one existed, accrued no later than the date upon which timely administrative review of the separation action was completed. In the case of the 1968 RIF, this date was March 29, 1968, the date on which the CSC rejected plaintiff's appeal, finalizing plaintiff's separation from duty. See Friedman v. United States, 159 Ct. Cl. 1, 10-13, 310 F.2d 381, 387-88 (1962), cert. denied sub nom. Lipp v. United States, 373 U.S. 932 (1963). Since plaintiff did not file suit in this court until March 13, 1978, this court lacks jurisdiction to consider the merits of any claims accruing prior to March 14, 1972. 28 U.S.C. Section 2501 (1976); Soriano v. United States, 352 U.S. 270, 273-74 (1957).

Plaintiff asserts that the running of the statute of limitations was tolled by defendant's alleged concealment of a cause of action arising from the 1968 RIF. See Japanese War Notes Claimants Ass'n. v. United States, 178 Ct. Cl. 630, 634, 373 F.2d 356, 358-59 (1967). In support of this theory, plaintiff contends that a letter, submitted by an agency personnel officer to the CSC appeals examiner, contained erroneous statements. Plaintiff further asserts that the

letter was withheld from him, or "concealed," until 1974, when the document was produced as a result of a Freedom of Information Act request.

In the letter, dated March 14, 1968, Dale C. Gough, Acting Personnel Director of the Boulder Laboratories of ESSA, set forth the agency's position regarding plaintiff's qualifications for certain professional engineering positions within ESSA. According to Mr. Gough, the agency did not consider plaintiff to possess the requisite education or experience to qualify for such engineering positions. In plaintiff's view, the CSC erred by not permitting plaintiff to view this letter. Moreover, plaintiff contends that this "concealment" tolled the running of the statute until the date of its discovery.

A RIF proceeding is not an adverse personnel action attended by a broad spectrum of procedural due process rights. See 5 C.F.R. Section 752.103(b)(3), 771.202(b)(3), 772.301, 772.305(a) (1968); See also Rasmussen v. United States, 211 Ct. Cl. 260, 267, 543 F.2d 134, 137 (1976).

The letter in question is simply an interpretation by the agency personnel officer of the CSC's engineering qualification standards, and plaintiff was afforded ample opportunity to present evidence of his engineering experience and other qualifications. Standing alone, the withholding of the letter did not constitute a violation of applicable procedures.

Plaintiff's reliance upon Japanese War Notes Claimants, supra, is misplaced. In that case, the court held that in order to toll the running of the statute,

* * * [p]laintiff must either show that defendant has concealed its acts with the result that plaintiff was unaware of their existence or it must show that its injury was "inherently unknowable" at the accrual date.178 Ct. Cl. at

273, 585 F.2d at 1051-52.

Plaintiff has admitted that he was aware prior to the 1968 RIF that the agency did not consider him qualified for professional engineering positions. Thus, the withholding of a letter summarizing the agency's interpretation of the qualification provisions, an interpretation which had previously been made known to plaintiff, does not constitute concealment of acts or occurrences constituting a cause of action, nor render plaintiff's perceived injury "inherently unknowable."

Plaintiff's assertion that the running of the statute was suspended during plaintiff's continuing pursuit of various grievances and appeals is also without merit. All such appeals were permissive in nature and did not toll the running of the statute. Friedman, supra, 159 Ct. Cl. at 11-12, 310 F.2d at 388.

II. The 1973 Reduction in Force

During the 8-month period following his 1968 separation by RIF, plaintiff obtained a professional engineer's license issued by the Board of Registration for Professional Engineers of the State of Colorado. Although the legislation which established the licensing procedures contemplated licensure of professional engineers on the basis of a qualifying examination, a temporary statutory exemption permitted certain practicing engineers to obtain licensure on the basis of experience.(footnote 2)

Footnote 2: Colorado Revised Statutes, Section 51-1-21(3) (1966).

Plaintiff submitted several letters of endorsement from previous federal supervisors, as well as letters from persons acquainted with plaintiff's previous experience in the private sector. On April 27, 1968, plaintiff was granted registration No. 8711, authorizing plaintiff to

practice as a professional engineer. However, the State of Colorado does not license professional engineers in specific categories or specialties; rather, the state authorizes each registrant to practice such engineering expertise as the registrant feels qualified to practice.

In October 1968, plaintiff was reemployed in the Boulder laboratories of the Department of Commerce. The position which plaintiff assumed was titled "Physicist (Atmospheric), GS-1310-11," in the Tropospheric Telecommunications Laboratory, a division of the Institute for Telecommunications Sciences (ITS), which in turn is a division of ESSA.

Plaintiff participated initially in the preparation of funding proposals which were submitted to the National Aeronautics and Space Administration (NASA) on August 28, 1969. Plaintiff coordinated the contributions of other ITS staff members and authored substantial portions of the proposals. The proposals involved the formulation of an experimental plan for the investigation of the interference effects of precipitation upon radio signal propagation through the turbulent atmosphere. Although the two proposals coordinated by plaintiff were not accepted by NASA, plaintiff's supervisor commended plaintiff for his work on the project.

At this point, plaintiff was assigned to a project leader position on another NASA-related project known as the Advanced Technology Satellite, Model F, (ATS-F) project. Plaintiff again assumed a coordinating, administrative role in addition to some engineering duties, and represented ITS in visits to representatives of the governments of Canada and Mexico. Plaintiff authored two technical memoranda during this period, and represented ITS at technical conferences where scientific papers were presented.

In July, 1972, plaintiff was assigned to a new project, involving the development of an engineering handbook concerning undersea cable telephone systems. Plaintiff served as project leader, principal researcher, and primary author of the handbook. Plaintiff obtained the needed information through contacts with domestic corporations, foreign governments, and other entities, compiling an extensive background library on the subject.

On April 25, 1973, plaintiff received a notice that his position at ITS was to be abolished in an agency-wide reduction in force. In lieu of separation, the agency offered plaintiff a one-year temporary appointment, effective June 16, 1973. Plaintiff accepted this temporary position. On June 28, 1973, plaintiff appealed his separation from career tenure to the Denver regional office of the CSC.

However, on its own initiative, the Boulder personnel office determined that plaintiff's separation was improper. The reason given was that plaintiff was performing substantially the same duties as he had performed prior to receiving the RIF notice, at the same salary, grade, and series. Accordingly, the personnel office determined that plaintiff's position had not been truly abolished.

Upon receiving notice that plaintiff's April 25 RIF notice had been cancelled, the CSC Denver regional office discontinued its adjudication of plaintiff's RIF appeal.

On July 31, 1973, the same day that plaintiff received notice that his earlier notice of separation had been cancelled, plaintiff received a second notice of separation by RIF. This notice stated that plaintiff's position had been identified for abolishment, and that plaintiff would be separated effective August 31, 1973.

The July 31, 1973 RIF notice informed plaintiff that he had been classified in retention subgroup IB (career tenure, nonveteran), with an initial service date of July 9, 1963. The RIF notice, signed by Dale C. Gough, personnel officer, also noted that the personnel office had determined that no other positions existed in plaintiff's competitive area to which plaintiff was entitled.(Footnote 3)

(Footnote 3) "Competitive area," for RIF purposes, includes "all or that part of an agency in which employees are assigned under a single administrative authority. A competitive area in the departmental service meets this standard when it covers a primary subdivision of an agency in the local commuting area." 5 C.F.R. Section 351.402(b) (1973); See also FPM Chapter 351, subchapter 4-2 (end of footnote 3)

On September 7, 1973, plaintiff lodged an appeal with the CSC, Denver Region, challenging his RIF separation. Although plaintiff raised numerous contentions regarding the legality of his separation in this appeal, only the specific contentions now alleged to have been the subject of error in the CSC's determinations will be addressed in this opinion.

First, plaintiff contends that the reasons for initiation of this second RIF action were improper, thereby rendering his separation void ab initio. Second, plaintiff asserts that a current retention register was not provided, a procedural error, which in plaintiff's view, requires cancellation of his separation.(Footnote 4) Third, plaintiff contends that he was consistently misclassified throughout the period of his employment with the Department of Commerce, and that the official position descriptions in his personnel folder were erroneous, prejudicing plaintiff in the exercise of his displacement, or "bumping" rights, and in subsequent appeals to the CSC. Fourth, plaintiff argues that three

positions to which plaintiff had displacement rights were not offered to him, in violation of applicable regulations. Fifth, plaintiff contends that the agency submitted untrue, misleading, and edited evidence to the appeals authorities during the course of the CSC's review of his 1973 RIF separation.

(Footnote 4) A retention register is a list of employees in competitive levels affected by RIF. See 5 C.F.R. Section 351.404 (1973). END FTNT 4)

The scope of review of the Court of Claims in cases involving challenges to RIF procedures is limited. Carlson v. United States, 214 Ct. Cl. 774 (1977); Barger v. United States, 170 Ct. Cl. 207, 214 (1965). Congress established the Civil Service Commission to regulate the federal personnel system, and to hear and resolve disputes arising from the application of federal personnel practices and policies to individual employees. The CSC (now the Merit Systems Protection Board) represents the repository of federal administrative expertise in personnel matters, and this court will not overturn the CSC's decision in the absence of an error "going to the heart of the administrative determination." Barger, supra.

Thus, CSC decisions are to be accorded finality in the absence of proof that the administrative determinations were arbitrary, capricious, an abuse of discretion, contrary to law, or unsupported by substantial evidence. Summers v. United States, 227 Ct. Cl. ___, ___, 648 F.2d 1324, 1327 (1981); Bielec v. United States, 197 Ct. Cl. 550, 560, 456 F.2d 690, 696 (1972). In this context, "substantial evidence" means such relevant evidence as a reasonable mind might accept to support a conclusion. Morelli v. United States, 177 Ct. Cl. 848, 852 (1966).

1. Improper RIF Initiation

Plaintiff's first contention with respect to

the 1973 RIF holds that the RIF was initiated for improper reasons. Noting that he was the sole ITS employee affected by RIF on August 31, 1973, plaintiff has asserted that no valid reasons existed to justify his separation at that time. Plaintiff has also asserted that agency personnel officials engaged in "threats," "trickery," and other improper acts, allegedly manipulating the merit system to plaintiff's detriment. According to plaintiff, the August 31, 1973 RIF was merely a concealed adverse action personally directed at plaintiff.

The circumstances which may validly form the basis for releasing an employee from his competitive level during a RIF are set forth at 5 C.F.R. Section 351.201(a) (1973). One such circumstance is a "reorganization." The FPM, Ch. 351, subch. 2-6 states:

* * * a reorganization occurs when management at any level adds to, takes from, or redistributes the functions or duties of one or more positions.

Both the appeals examiner assigned to plaintiff's appeal and the Appeals Review Board (ARB) of the CSC found that ITS management, as part of a large scale retrenchment in 1973, had redistributed plaintiff's official duties among four other ITS employees. Plaintiff's duties on the ATS-F project were reassigned to Gene Adams, and the workload of the undersea cable engineering project divided among Dr. Hoke Willis, Dr. Robert Gallawa, and Dr. Thijs DeHaas.

In addition, the ARB noted that the decision to reorganize and abolish plaintiff's position was a proper exercise of managerial discretion, and not motivated by personal bias or malice. A separate, formal grievance hearing initiated by plaintiff and held on January 21, 1974, pursuant to 5 C.F.R. Section 771 (1974), also found no evidence of threats or malicious bahavior on the part of agency management.

The CSC decisions on this issue are supported by substantial evidence, and no errors of law were committed. The decision to separate an employee by reduction in force is committed to the discretion of agency management, and will not be the subject of judicial inquiery in the absence of demonstrated bad faith or underhandedness. See Gibson v. United States, 176 Ct. Cl. 102 (1966).

Proof of bad faith on the part of government officials in the performance of their official duties requires compelling evidence. Keener v. United States, 165 Ct. Cl. 334, 339 (1964). Government officials are presumed to act in good faith in the discharge of their duties and "well-nigh irrefragable proof" is required to establish the contrary. Knotts v. United States, 128 Ct. Cl. 489, 492, 121 F. Supp. 630, 631 (1954). See also Grover v. United States, 200 Ct. Cl. 337, 344 (1973).

Apart from plaintiff's own testimony, plaintiff has not produced any probative evidence which might rebut this presumption. Moreover, to the extent that plaintiff's allegations of deception sound in tort, they are beyond the jurisdiction of this court. 28 U.S.C. Section 1491 (1976); McCreery v. United States, 161 Ct. Cl. 484, 488 (1963).

2. Failure to Provide a Current Retention Register

As a second contention, plaintiff asserts that the agency failed to provide him with a complete and accurate retention register at the time of the August 31, 1973 RIF.

The maintenance of retention registers for reduction-in-force purposes is addresed by CSC regulations and by Chapter 351 of the FPM. 5 C.F.R. Section 351.505 (1973) provides in pertinent part:

Each agency shall maintain the current correct records needed to determine the retentio standing of its competing employees. The agenc shall allow the inspection of its retentio registers and related records by:

* * * * *

(d) An employee of the agency to the extent that the registers and records have a bearing o his case.

The agency shall preserve intact all registers and records relating to an employee for at least 1 year from the date the employee is issued a specific notice.

The FPM elaborates upon the regulatory requirements of Section 351.505. Subchapter 4-6 of Chapter 351 notes that a retention register is required for each reduction in force, even in the case where the employee occupies the only position within his competitive level.(Footnote 5)

(Footnote 5) " * * * A level may consist of only one job when that job is so nearly unique that it is not interchangeable with similar jobs." See FPM, Chapter 351, subch. 4-3 (Inst. 188, February 28, 1973.)(end of footnote 5)

Chapter 351, Appendix A, part A-1 of the FPM defines the agency's responsibility in regard to the content of and provision of access to retention records. The pertinent part states:

[Retention registers and related records] must be kept open to the employees, to an extent sufficient to settle, as far as possible, all of their questions about reduction in force. The employee is entitled to see not only the register and related records for his own competitive level, but also for levels in which there are employees who may displace him, and for levels in which he believes he may be entitled to displace.

[emphasis added.]

The information needed to establish these records is also set forth in this part. This information includes:

1. Identity of employee
2. Date of Birth
3. Identity of position
4. Official position (schedule, class series, grade, and pay)
5. Position description
6. Location of position
7. Status (competitive or excepted service)
8. Competitive status
9. Full time/part time basis of employment
10. Tenure of employment
11. Veteran preference
12. Retention rights.

Plaintiff's expert witness on federal personnel matters, Richard K. Mazeau, (Footnote 6) addressed the need for accurate retention records. According to Mr. Mazeau, retention records are needed at two stages of the RIF process.

(Footnore 6): Mr. Mazeau is a former Director of Personnel and Chief of the Classification and Pay Management Division of the Maritime Administration, Department of Commerce.(end of footnote 6)

During the first stage, the employee is entitled to inspect the retention register for his own competitive level, in order to verify that he has been validly released from the competitive level. During the second stage, the employee is to be afforded access to the retention records for other competitive levels, to determine the nature and extent of possible displacement rights.

Plaintiff testified at trial that in lieu of a retention register prepared specifically for the August 31, 1973 RIF, the agency provided access to

the retention registers prepared for the earlier, April RIF in which many ITS employees were affected. In addition, the record indicates that personnel officials afforded plaintiff access to computer printouts listing all ITS employees, position titles, grades and series, service dates, and retention subgroups. These documents, which were entered into evidence, display the notation. "As of August 04, 1973."

A memorandum from Ben Darby, ITS Area Personnel Office, advised plaintiff that the agency viewed plaintiff's separation as occurring within the 90-day period following the April 1973 mass RIF of ITS employees. Since the agency viewed plaintiff's separation as a mere continuation of the earlier personnel action, the agency contended that no new retention register was needed. In addition, Edgar Hubin, the employee relations officer for the Boulder laboratories of the Department of Commerce at the time of plaintiff's separation, testified at trial that he annotated the April retention register for plaintiff's competitive level to reflect the changes that had occurred as a result of the earlier RIF processes. According to Mr. Hubin, this annotated register complied with CSC requirements.

However, plaintiff testified that the records needed for the second stage of competition, in which plaintiff should have been able to determine possible displacement rights with respect to other positions, were incomplete.

In particular, plaintiff has pointed out that neither the April retention register nor the computer printout of ITS employees contained the name of one Steven Rosen, who occupied an Operations Research Analyst position to which plaintiff claimed entitlement. The agency did not offer plaintiff a position in lieu of separation, and has contended throughout the appeals process that plaintiff's displacement rights were no

greater at the time of his August 31, 1973 separation than they were at the time plaintiff received the April 1973 notice of separation by reduction in force.

Plaintiff then appealed his separation to the Denver Regional office of the Civil Service Commission. In an opinion dated January 7, 1974, the CSC regional director dismissed each of plaintiff's contentions regarding the validity of his separation, and adopted the agency's position that the August 31, 1973 separation was a continuation of the earlier, agency-wide reduction in force, obviating the need for a new retention register.

Upon subsequent appeal, the CSC Appeals Review Board (ARB) rescinded the January 7, 1974 decision of the regional office and remanded the case for further adjudication at the regional level. Specifically, the ARB requested further examination of plaintiff's contentions regarding his qualifications to displace certain agency positions occupied by employees with lower retention standing. The regional office was directed to examine certain supplemental materials to be submitted by plaintiff in support of his claim of qualification for various positions, including professional engineering positions. However, there is no evidence in the record to indicate that the ARB specifically addressed the question of a separate retention register for the August 31, 1973 RIF.

Upon remand, the regional office (now designated the Denver Field Office of the Federal Appeals Authority (FEAA)) redrafted its opinion and examined plaintiff's qualifications for a number of positions, including positions which had been vacancies at the time of the April reduction in force. On January 24, 1975, the FEAA issued its redrafted decision, which recommended that plaintiff be offered the position of Electronic Engineer, GS-855-7, occupied by one Donald J.

Burch, or another position at an equal grade with a work schedule of at least 25 hours per week.

The decision also addressed the question of a separate retention register. According to the FEAA's decision:

The appellant's next contention is that concurrently with the cancellation of the specific notice of April 25, 1973, the agency was obligated to establish a new retention register and determine his assignment rights as of August 31, 1973. The agency contends that when the first specific notice was cancelled the agency was still in a reduction in force posture and that the appellant had no assignment rights under either notice dated April 25, 1973, or July 31, 1973. The appellant has introduced no evidence to show that his assignment rights would be greater on August 31, 1973, than June 30, 1973. Accordingly, his assignment rights will be determined as of June 30, 1973.

The agency appealed the decision of the Denver field office to the ARB, contending that the position which the regional office recommended be offered to plaintiff was a vacancy, and that the agency was not required to fill vacancies in a RIF.

On July 14, 1975, the ARB affirmed the decision of the Denver field office and ordered the agency to take the corrective action previously recommended. In regard to the issue of a separate retention register, the ARB noted:

* * * Specifically, the Field Office determined that no new retention register was required to be prepared by the agency as a result of the time which passed between the appellee's reduction in force notices,* * *.

The ARB concludes its opinion with the following language:

A further review of the record discloses that the Field Office was correct in its findings on all of the relevant aspects of the reduction-in-force action effected in the appellee's case.

The clear implication of the CSC's decisions on the retention register issue is that the agency's failure to provide retention registers or equivalent information for all agency positions did not substantially prejudice plaintiff.

In our opinion, the annotated register prepared by Mr. Hubin complied with the regulatory requirement that a retention register be provided for the competitive level from which plaintiff was separated. However, the record indicates that the information provided to plaintiff regarding positions in other competitive levels was incomplete. In particular, the computer printouts, provided in lieu of formal retention registers, omitted employees of the Policy Support Division, who were included within plaintiff's competitive area.

As a consequence of his previous separations by reduction in force, as well as the resulting appeals, plaintiff was highly knowledgeable regarding RIF procedures. Plaintiff's appeal of the August 31, 1973 separation identified some 13 positions to which plaintiff claimed entitlement, including Mr. Rosen's position in the Policy Support Division. In addition, despite access to agency records provided to plaintiff during the discovery phase of this case and by plaintiff's previous FOIA requests, plaintiff failed to identify a single position, unknown to him at the time of his August 31, 1973 separation, to which he conceivably had a "bumping" or 'retreat" right.

Moreover, in an appeal brief filed by plaintiff with the ARB on February 12, 1975, plaintiff admitted that, during the appeal process, he had been considered for all positions within the competitive area to which he might have

had a "bumping or "retreat" right.

In the absence of a colorable showing that the agency's omission of certain positions from the retention registers and other records actually prejudiced plaintiff, we conclude that this defect in the August 1973 RIF proceedings was harmless error. See Haynes v. United States, 190 Ct. Cl. 9, 15, 418 F.2d 1380, 1384 (1969); Gratehouse v. United States, 206 Ct. Cl. 288, 301, 512 F.2d 1104, 1111 (1975).

3. Alleged Misclassification

In addition to cancellation of plaintiff's August 31, 1971 separation by reduction in force, plaintiff seeks reclassification, retroactive upgrading of every position encumbered by him since 1968, and reinstatement as a GS-14 electronics engineer from the date of his 1973 separation from duty. (At the time of his separation, plaintiff was classified as a GS-11 physicist.) Plaintiff seeks back pay based on the pay differences between the actual grade levels of these positions and the grade levels which plaintiff feels should have been assigned to those positions.

However, the Court of Claims lacks jurisdiction to grant such relief. This court may not award back pay for a position to which a federal employee was never appointed, nor order an employee reclassified, either prospectively or retroactively, to a new position. Smith v. United States, 228 Ct. Cl. ___, ___, 654 F. 2d 50, (1981); United States v. Testan, 424 U.S. 392, 400 (1976).

4. Inaccurate Position Descriptions

As a further ground for relief, plaintiff charges that the official position descriptions (OPD's) prepared by the agency in connection with the various positions held by plaintiff during his

tenure as a federal employee were fundamentally inaccurate.

Plaintiff further contends that these inaccurate OPD's were relied upon by the CSC in determining his rights to positions held by persons of lower retention standing at the time of his 1973 separation by RIF. In plaintiff's view, this alleged reliance upon inaccurate records rendered the CSC's decisions arbitrary, capricious, and contrary to regulation.

Chapter 511, Subchapter 4-1 of the FPM defines the employee's position description as "a written description of the duties and responsibilities of each position that is established or changed." Subchapter 4-2(a) addresses the question of accuracy:

* * * A position description is adequate if it states the principal duties, responsibilities, and supervisory relationships of a position sufficiently clearly and definitely to provide information necessary for its proper classification when:

(1) Considered by one familiar with the occupational fields involved and the application of pertinent classification standards and

(2) Supplemented by otherwise readily available and current information on the organization, functions, programs, and procedures concerned.

The employee's OPD represents an important source of information for RIF purposes. In the first round of competition, the position description is needed to ensure that the employee has been assigned to the proper competitive level. During the second round of competition, the document serves to identify experience, skills, and knowledge relevant to the agency's determination of the employee's qualifications to displace, or "bump," other employees with inferior

retention standing. Finally, the OPD is needed by the CSC during its review of the agency's determination in the case of a challenge.

The alleged inaccuracy of plaintiff's OPD's was the subject of an extensive special inquiry undertaken by the CSC, Denver Region, in 1976. In addition, the Office of Audits of the Department of Commerce examined this issue in a separate review of plaintiff's employment history. Both the SCS special inquiry and the Department of Commerce audit were the result of a long series of complaints and grievances pursued by plaintiff through agency and CSC channels. These complaints and grievances all contained allegations that the OPD's contained in plaintiff's official personnel folder did not reflect the actual duties performed by plaintiff during his tenure as a federal employee.

The first report, titled "Special Inquiry into the Employment History of Mr. Ralph R. Bergman," was prepared by the CSC Denver Regional Office under the supervision of the regional director, Mr. George F. Dwyer.

The preparers of the special inquiry report compared plaintiff's past official position descriptions with numerous documents supplied by plaintiff, including samples of his prior work product and various letters of commendation. In addition, previous supervisors, co-workers, and agency officials were interviewed. As a result of this process, new duty statements were prepared to more fully detail the nature and extent of the duties performed by plaintiff in his various federal positions.

The CSC's regional director, Mr. Dwyer, concluded that plaintiff's official position descriptions did not meet the CSC standards for adequacy found at Chapter 511, subchapter 4-2(a) of the FPM. Mr. Dwyer found that plaintiff's official position descriptions were "extremely broad and general statements of the principal duties and responsibilities performed by [plaintiff]" and ordered ITS management to incorporate the newly prepared duty statements within plaintiff's official personnel folder.

A second analysis of plaintiff's official position descriptions was undertaken by the Office of Audits, Department of Commerce, at the direction of Ms. Elsa A. Porter, Assistant Secretary of Commerce for Administration. The report of the Office of Audits contained essentially similar conclusions to those set forth in the CSC special inquiry report, but further concluded that plaintiff had been erroneously classified as a physicist, rather than electronics engineer, at the time of his separation in the August 1973 RIF. However, the Office of Audits' report also noted:

We were advised that regardless of classification, Mr. Bergman's job was identified for abolishment, and electronics engineering positions for which he had possible assignment rights were also abolished. We did not attempt to verify this statement, because we believed we could not accomplish it with certitude.

It should be noted that despite plaintiff's persistence in raising this issue of inaccurate OPD's through various informal and irregular channels, plaintiff has never undertaken a formal classification appeal by which the misclassification and position description issues could be resolved. See 5 C.F.R. Section 511.603 (1973). As a result, defendant suggests that plaintiff was obliged to file such a classification appeal as a prerequisite to seeking

relief in this court. However, in view of the fact that this lack of specificity in plaintiff's OPD's may have affected the CSC's review of his 1973 separation by RIF, this court may examine this issue as it relates to the question of whether the administrative decisions affecting plaintiff were supported by substantial evidence.

At the trial of this case, plaintiff introduced volumes of documents detailing the work product of his federal work assignments, as well as many of the same letters of recommendation and other materials submitted to the CSC for review at the time the special inquiry report was prepared. A review of the evidence submitted in this case and comparison with the duty statements contained in the CSC special inquiry report has revealed no discrepancy or ascertainable inaccuracy in the duty statements. Accordingly, for the purposes of this case, the contents of the special inquiry report will be presumed to be factual.

Plaintiff's OPD's are generically descriptive of his actual duties, with occasional temporal lags between changes in plaintiff's actual duties and the preparation of new position descriptions. However, plaintiff's OPD's lack the detail and specificity which would be needed by an upper-level agency manager or outside observer in assessing plaintiff's qualifications for positions outside the physics field.

As noted previously in this opinion, two decisions were rendered by the CSC, Denver Region, during the administrative review of plaintiff's August 31, 1973, RIF separation. It is clear that the initial decision of the CSC's appeals examiner did rely exclusively upon the contents of plaintiff's OPD's, and the representations of the employing agency, ITS, in assessing plaintiff's qualifications to "bump" the incumbents of certain engineering positions. However, upon subsequent appeal to the Board of Appeals and Review, plaintiff raised the issue of the inaccuracy of

his OPD's. As a result, the BAR order of remand specifically directed the appeals examiner to consider such other materials as plaintiff might submit in support of his claims of entitlement to electronics engineering positions within ITS.

Upon remand, the appeals examiner delegated this qualifications determination to Mr. Leroy L. Lilly, chief of the CSC (Denver Region) staffing division, who incorporated plaintiff's submissions into the appeal record and fully considered these statements, letters, and work product documents in preparing the advisory opinion on plaintiff's qualifications.

Mr. Lilly's final advisory opinion, which was adopted by the FEAA appeals examiner, held that plaintiff was qualified for electronics engineering positions at the GS-7 level. This decision was affirmed by the Appeals Review Board, and such a position was subsequently offered to and accepted by plaintiff on August 12, 1975, with back pay and other benefits restored for the period of his separation.

The special inquiry report which concluded that plaintiff's OPD's were insufficiently detailed was the subject of a petition to reopen plaintiff's case filed with the Commissioners of the CSC by plaintiff in 1976. However, the Commissioners declined to do so, on the basis that plaintiff had adduced no new material evidence sufficient to indicate error in the previous decision of the Appeals Review Board.

The evidence introduced by plaintiff in this court is largely the same collection of letters of recommendation, work product samples, and other materials considered by Mr. Lilly in the preparation of the advisory opinion. On this record, the court concludes that any prejudice which plaintiff may have suffered as a result of the CSC's initial reliance upon insufficiently detailed position descriptions was fully cured by

the CSC's subsequent consideration, upon remand, of plaintiff's supplementary submissions supporting his claim of qualification for engineering positions.

Furthermore, for reasons which will be fully explored in the discussion of plaintiff's qualifications for specific positions, infra, plaintiff has failed to demonstrate that the determinations set forth in the advisory opinion, adopted by the appeals examiner, and affirmed by the Appeals Review Board, were arbitrary, capricious, unsupported by substantial evidence, or otherwise contrary to law or regulation.

5. Qualification for Specific Positions

As noted previously, plaintiff was offered the position of Electronics Engineer, GS-855-7 (part-time), as a result of the administrative review of his 1973 separation by RIF. As an additional ground for relief, plaintiff has alleged that at least three positions existed at the time of the 1973 RIF which constituted better offers than the position actually offered. These positions have been identified as:

(a) Operations Research Analyst, GS-1515-9, occupied by Steven Rosen;

(b) Electronics Engineer, GS-855-9, occupied by Richard Chandler; and

(c) Electronics Engineer, GS-855-7, occupied by Forrest E. Marler.

Plaintiff contends that each of these employees was classified in a lower retention subgroup than himself, and that he posessed the requisite qualifications for assignment to their positions. Accordingly, plaintiff asserts that the CSC acted arbitrarily, capriciously, and in disregard of applicable regulations in failing to offer one of these positions.

A RIf'ed employee's entitlement to displace, or "bump", the incumbent of a position in a different competitive level is subject to three conditions. First, the employee sought to be displaced must be classified in a lower retention subgroup than the employee seeking assignment. 5 C.F.R. Section 351.703(a)(1) (1973). Second, the RIF'ed employee must meet the CSC's minimum qualification standards for the position. 5 C.F.R. Section 351.701(a)(1) 1973. Third, the RIF'ed employee must possess the "capacity, adaptability, and any special skills needed to satisfactorily perform the duties and responsibilities of the position without undue interruption to the activity." 5 C.F.R. Section 351.701(a)(4) (1973). See also FPM Chapter 351, subchapter 7-6(a).

Chapter 351, subchapter 7-6(b) of the FPM specifically addresses the factors to be considered in determining employee qualifications:

* * * When an employee released from his competitive level has retention standing enough to displace another employee, the agency must determine whether he is qualified in the sense of this section. In this determination, the agency must review carefully the employee's education, training, and experience. When the agency finds him qualified in these respects, that is, in terms of the Commission's standards and requirements, it must review even more carefully to determine if he has any special skills and knowledges [sic] the position requires, as well as any less tangible attributes, such as adaptability and ability to meet and deal with others when these are required by the job. To be considered qualified, and thus entitled to be placed, the employee should not need a significant amount of training in the actual duties of the position, although some instruction may be necessary to familiarize him wih the organizational structure and with the office policies and routines he will have to apply. In other words, he ought to be as well-qualified for the position as if he had already

performed successfully in a similar position, because he must be able to keep the work moving without serious interruption. * * *

For the reasons set forth below, the court finds that plaintiff has failed to prove that the FEAA's decision to offer the position of Electronic Engineer, GS-855-7 (part-time), in lieu of the three positions identified by plaintiff, was arbitrary, capricious, contrary to regulation, or unsupported by substantial evidence.

(a) Operations Research Analyst, GS-1515-9

This position, occupied by Steven Rosen at the time of plaintiff's 1973 separation by RIF, involved the application of systems engineering and operations research techniques to the study of telecommunications issues. At the time of the August 1973 RIF in which plaintiff was adversely affected, Mr. Rosen was engaged in a continuing project involving the analysis of policy issues relating to the implementation of a nationwide home warning system.

The advisory opinion relied upon by the FEAA in assessing plaintiff's qualifications determined that plaintiff possessed the requisite qualifications to undertake Mr. Rosen's position. Since Mr. Rosen was classified in retention subgroup III-B, and plaintiff in subgroup I-B, plaintiff would have been entitled to assignment to Mr. Rosen's position unless such displacement would have involved an "undue interruption to the activity."

In a submission to the FEAA dated September 20, 1974, Edgar Hubin, ITS Acting Personnel Officer, set forth the agency's position on the undue interruption issue. In the opinion of agency officials, Mr. Rosen's work had progressed to the point that displacement by plaintiff would have seriously impeded the progress of the home warning project. According to Mr. Rosen's

supervisor, Roger Salaman, substitution of plaintiff for Mr. Rosen would have interrupted a "critical study involving the highest national interests."

At trial, plaintiff sharply disputed this contention, and termed Mr. Hubin's submission to the FEAA a "snow job". Plaintiff testified that the home warning system in question involved a "$35 radio receiver, * * * which you would tune to the weather forecast."

However, the thrust of the agency's undue interruption statement was not directed to the engineering aspects of the home warning system. Rather, Mr. Salaman emphasized the timing of plaintiff's proposed displacement, which would have occurred at the culmination of a year-long study of the various technical options, economic considerations, institutional and political implications, and other factors inherent in the policy-making process. Although plaintiff was afforded the opportunity to address the agency's specific objections before the FEAA, the Appeals Review Board, and during the trial of this case, he failed to do so.

On the basis of the record before it, the FEAA determined that a period "in excess of six months" would have been required for plaintiff to become fully proficient in Mr. Rosen's position. This decision was affirmed by the Appeals Review Board.

The responsibility for determining which reassignments would unduly interrupt agency business is vested within the managerial discretion of the agency. Absent a clear showing that agency officials acted in excess of their delegated authority, abused their discretion, or reached a result unsupported by substantial evidence, such decisions will not be the subject to judicial interference. Alexander v. United States, 211 Ct. Cl. 368, 369 (1976); Wilmot v. United states, 205 Ct. Cl. 666, 679 (1974).

On the basis of the administrative record, and the evidence and testimony adduced in this case, we conclude that plaintiff has failed to rebut the previous determinations on this issue, or to demonstrate that the CSC's decisions regarding plaintiff's entitlement to the Rosen position were arbitrary, capricious, or unsupported by substantial evidence.

(b) Electronics Engineer, GS-855-9 (Chandler)

At the time of plaintiff's separation, Mr. Chandler was working on a project titled "Automatic Radar Braking System," involving the automotive installation and testing of microwave and millimeter wave radar systems. Mr. Chandler had been reassigned as a result of an earlier RIF in 1973, and the advisory opinion addressing plaintiff's qualifications for Mr. Chandler's position was delayed due to the agency's error in submitting an outdated position description.

The FEAA determined that plaintiff lacked sufficient training and experience in the operation and maintenance of microwave and millimeter wave equipment to displace Mr. Chandler. According to the advisory opinion on plaintiff's qualifications, which was prepared following a review of plaintiff's extensive submissions in support of his claim of entitlement to this position, plaintiff's record demonstrated no experience in "radar ranging, digital interface equipment, digital tape recording, X-band, MM-waver, or automotive applications."

The FEAA adopted the conclusions of the advisory opinion, and the FEAA determination was affirmed by the Appeals Review Board. At trial, plaintiff testified that previous experience with high frequency and very high frequency laboratory equipment had provided him with sufficient experience to undertake the duties of Mr. Chandler's position.

However, as in the case of Mr. Rosen, plaintiff again failed to address the specific deficiencies in his previous work experience cited in the opinions of the FEAA and ARB. Although plaintiff's expert witness on personnel matters, Mr. Mazeau, testified that plaintiff qualified for the Chandler position, he provided no basis or reasoning to support his conclusion. In view of Mr. Mazeau's admitted dearth of training or experience in the field of electronics engineering, such an opinion must be considered suspect, particularly when it contradicts the opinions of agency managers and qualified graduate engineers with actual knowledge of the requirements of the Chandler position.

In view of the foregoing, and having searched the record without success for some evidence of training or experience in the specific areas required by the Chandler position, we conclude that the CSC's decisions on this question were neither arbitrary nor capricious, and are supported by substantial evidence.

(c) Electronics Engineer, GS-855-7 (Marler)

According to the personnel records of the agency, Mr. Marler was upgraded from retention subgroup II-A to retention subgroup I-A on July 12, 1973. Thus, at the time of plaintiff's August 31, 1973 separation by RIF, Mr. Marler was classified in a superior retention subgroup, and would not be subject to displacement by plaintiff, who was classified in subgroup I-B. Although both Mr.Marler and plaintiff were career tenured employees at the time of plaintiff's RIF separation, Mr. Marler's superior retention standing derives from veteran's preference eligibility.

6. Alleged Improper Submissions to FEAA

Plaintiff has argued strenuously that ITS officials deprived him of a fair hearing before

the FEAA by editing several statements supportive of plaintiff's engineering qualifications from a letter submitted to FEAA by ITS during the appellate process.

The record indicates that, in response to the various materials submitted by plaintiff in support of his claims of entitlement to engineering positions, ITS Associate Diector Joseph Hull drafted a memorandum rebutting certain statements contained in plaintiff's submission. Mr. Hull's memorandum did, however, confirm certain observations concerning plaintiff's engineering contributions to ITS projects.

Prior to the submission of the agency's actual rebuttal statement to the FEAA, ITS Executive Officer Frank W. Smith edited Mr. Hull's memorandum. Mr. Smith deleted Mr. Hull's references to plaintiff as "project engineer," as well as a statement confirming that plaintiff had worked on engineering programs. The final ITS submission described plaintiff's role at ITS as that of a "technical contributor." Mr. Smith also deleted several statements which were critical of plaintiff's maturity and professional ability.

Plaintiff now asserts that the acceptance of such allegedly "untrue, misleading, and edited" evidence by the FEAA violated plaintiff's right to procedural due process, and constituted a procedural error sufficient to void the FEAA's determination.

Initially, it must be noted that claims based upon alleged violations of the due process clause of the fifth amendment fall beyond the jurisdiction of the Court of Claims. See Muehlen v. United states, 209 Ct. Cl. 690, 691 (1976); Eastport S.S. Corp. v. United States, 178 Ct. Cl. 599, 605-607, 372 F.2d 1002, 1007-8 (1967).

As for the question whether the FEAA erred in accepting this submission of the agency, it is

clear that it did not. This statement of the agency was accepted by the FEAA during its initial factfinding. Plaintiff was afforded ample opportunity to submit evidence in support of his claim for qualification for engineering positions, and he did so, in volume. As noted previously, the FEAA found in plaintiff's favor on this question, and ultimately plaintiff was offered an electronics engineering position.

During review of the determinations of the FEAA, it is not the function of this court to second-guess the administrative factfinder on such questions as the credibility of witnesses, the weight to be accorded various items of evidence, or the motives of those appearing on behalf of the agency. Rather, the role of the court is to examine the record, and to determine whether the decision of the administrative tribunal was reasonable, in accordance with applicable statutory and regulatory authority, and supported by "such relevant evidence as a reasonable mind might accept to support a conclusion." Palmer v. United States, Ct. Cl. No. 176-80C (Order of December 8, 1981); See also, Sternberger v. United States, 185 Ct. Cl. 528, 535, 401 F.2d 1012, 1016-17 (1968).

As previously noted, we conclude that the decisions of the FEAA and ARB in plaintiff's case met this standard.

III. Alleged Involuntary Retirement

Following plaintiff's reinstatement to the position of Electronics Engineer, GS-855-7 (part-time), plaintiff experienced some difficulties with his new work assignments. According to plaintiff's testimony and the findings of the CSC special inquiry report, plaintiff did not receive identifiable work assignments for a period of approximately 6 months.

At this point, plaintiff was assigned two work

projects which terminated unsatisfactorily. According to plaintiff, improper tools were given to do the work, and plaintiff became frustrated. Finally, plaintiff was assigned the task of plotting the geographic coordinates of United States railroads.

At trial, plaintiff testified that his mounting frustration with his new work assignments caused him to become ill. After he exhausted his available sick leave, plaintiff elected disability retirement.

Plaintiff now contends that the acts of agency officials in assigning spurious work assignments, or in failing to assign work assignments, were the cause of his disability. According to plaintiff, these circumstances constituted a coerced retirement. Apart from plaintiff's own testimony, no evidence can be found in the record to substantiate such an allegation. However, this court need not address the merits of this contention for the following reasons.

First, plaintiff's allegation that the acts of defendant's officers and employees were causative of his illness represents a claim in tort beyond the jurisdiction of this court. 28 U.S.C. Section 1491, Eastport S.S. Corp., supra, 178 Ct. Cl. at 609, 377 F.2d at 1010.

Second, plaintiff's claim that his retirement was coerced has never been raised before the Department of Commerce, the Civil Service Commission, or the Merit Systems Protection Board. If plaintiff believed that the circumstances surrounding his retirement for disability constituted an adverse personnel action, his remedy lay before the CSC via 5 C.F.R. Section 772.301 (1976). His failure to exhaust his administrative remedies on this issue, absent some mitigating circumstances, is fatal. Hansen v. United States, 213 Ct. Cl. 688, 689 (1977); Haynes v. United States, 190 Ct. Ct. 9, 12-13, 418 F.2d

1380, 1382-83 (1969).

Conclusion

For the reasons previously set forth, it is concluded that plaintiff is not entitled to recovery. Accordingly, it is recommended that his petition be dismissed.

FINDINGS OF FACT

1. This is an action brought by Ralph Roger Bergman ("plaintiff"), a citizen of the United States and former employee of the Department of Commerce, against the United States for the recovery of back pay and other benefits, restoration to former position, and correction of official personnel records. Jurisdiction over certain of plaintiff's claims is conferred by 28 U.S.C. Section 1491 (1976 and Supp. III 1979) and 5 U.S.C. Section 5596 (1976 and Supp. IV 1980).

In all, plaintiff has alleged that :

a. Plaintiff's separation from federal employment in February 1968, by reduction in force ("RIF") was an arbitrary and capricious personnel action;

b. Plaintiff's separation from federal employment in August 1973, by RIF was invalid, in that:

(1) The RIF was initiated for invalid reasons;

(2) The Department of Commerce violated RIF procedural regulations in effecting plaintiff's separation;

(3) Plaintiff's position was erroneously classified as that of "Physicist," rather than "Electronics Engineer;"

(4) Plaintiff's official personnel records did not accurately reflect his qualifications in electronics engineering, prejudicing plaintiff in the exercise of his RIF displacement rights;

(5) Plaintiff was not permitted to displace employees with lower retention standing who occupied positions for which plaintiff was qualified; and

(6) Department of Commerce officials submitted misleading information to the former Civil Service Commission (CSC) during appellate review of the validity of plaintiff's 1973 separation;

c. The CSC erred when it reviewed the validity of plaintiff's separation by RIF in 1968 and 1973; and that

d. Plaintiff's retirement on disability in March 1977, was coerced and involuntary.

I. Factual Background of the 1968 RIF

2. Plaintiff was intially hired by defendant in October 1962, for the position of Physicist, GS-1310-5, located in the High Frequency/Very High Frequency (HF/VHF) Research Section, Radio Systems Division, National Bureau of Standards ("NBS"), Department of Commerce. Plaintiff's duty station throughout his federal career was Boulder, Colorado.

3. Between October 1962 and March 1963, plaintiff received a project orientation regarding specialized equipment and techniques used in the High Frequency/Very High Frequency Research Section. A special inquiry into plaintiff's work career was conducted by the former United States Civil Service Commission in 1976. (See findings of fact 98-103, supra). This investigation, hereinafter referred to as the CSC special inquiry, determined that plaintiff performed "some

engineering tasks in electronics, photography, and optics" during this orientation period.

4. Following the orientation period, plaintiff engaged in various data acquisition and analysis tasks relating to the work of the HF/VHF section in the study of radio signal propagation through the atmosphere. These tasks included operation of specialized experimental equipment and assistance in data analysis.

5. In November 1963, plaintiff was promoted to the position of Physicist, GS-1310-7, and continued his work in support of the radio signal propagation studies performed by the HF/VHF section. According to the official position description (PD) for this post, plaintiff's duties included operation of the various equipment involved; assistance in experimental design; maintenance, operation, and improvement of a "highly complex" scanning antenna system; writing specifications for installation and construction projects; and assistance in data analysis and evaluation.

6. The CSC special inquiry determined that plaintiff had been placed in charge of redesigning certain system receiving antennas, which was necessary due to frequent wind damage problems. Plaintiff recommended design improvements, negotiated with the antenna manufacturer for the supply of new components, and developed a novel connector device for attaching delicate foamflex antenna feed lines to the antenna supporting structures. Plaintiff was awarded U.S. Patent No. 3,286,963 in 1966 for this invention.

7. In November 1964, plaintiff was promoted to Physicist (Physics of Atmosphere), GS-1310-9, for continuing duty in the HF/VHF section. According to the PD, plaintiff assumed additional responsibilities in experiment design and execution, as well as design and construction of specialized equipment where appropriate. In

addition, plaintiff presided over the execution of the experiment, evaluated the data collected, and modified experimental parameters where necessary to accomplish project objectives.

8. According to the CSC special inquiry, plaintiff worked on a laser propagation project from November 16, 1964, to June 20, 1964. Plaintiff conducted experimental measurements of laser propagation phenomena, coordinated various field experiments, and analyzed and interpreted the data collected. No routine written reports were required.

The special inquiry report also found that plaintiff selected and set up electronic instrumentation, and designed and monitored the construction of a laser camera for use in the experiments.

9. In June 1965, plaintiff assumed the position of Physicist (Optics), GS-1310-9, in the Optical Propagation and Laser Communication Section, Tropospheric Telecommunications Laboratory, a division of the Environmental Science Services Administration ("ESSA"), of the Department of Commerce. Plaintiff's duty station remained in Boulder, and the PD for this position was essentially a copy of plaintiff's previous PD. The actual project work was a continuation of the laser propagation experiments.

10. The CSC special inquiry reported that between June 1965, and June 1967, plaintiff served as a member of a project group carrying out the laser propagation experiments. The special inquiry report noted that plaintiff assisted the project leaders and program chief in computation, measurement, analysis and interpretation tasks. In addition, plaintiff designed and supervised the fabrication of a specialized telescope for laser beam transmission, a servo-controlled mount for the telescope, and radio-linked feedback systems for remote control of various experimental

parameters during the laser tests.

11. In the spring of 1967, plaintiff met with Mr. Robert Lawrence, one of plaintiff's supervisors, who advised him that he would not be able to advance from the GS-11 level as a physicist. On April 7, 1967, Mr. Lawrence suggested that plaintiff's competitive level be changed to engineering and recommended that plaintiff be promoted to a GS-11 engineering position from the GS-9 physics position. However, the ESSA personnel department refused to implement this classification change request and continued to classify plaintiff as a physicist.

12. In July 1967, plaintiff was assigned to PD designated CE-379, in connection with promotion to a position titled Physicist, (General), GS-1310-11. The position description included a "classification note" providing: "This position is interdisciplinary and is allocable to the following: 1. GS-1310-11 Physicist (General), [and] 2. GS-801-11 General Engineer." Plaintiff's competitive level remained "Physics of the Atmosphere."

13. The CSC special inquiry reported that during the period from June 1967, to February 1968, plaintiff's duties included, as a special project, planning and supervising the construction of a highly specialized optical propagation laboratory building for an agency testing range located on Table Mountain, Colorado. Plaintiff had substantially complete responsibility for the project during all phases of design and construction, reporting directly to the program chief.

14. According to the job performance checklists completed by plaintiff's federal supervisors, plaintiff's work from the period 1962 to 1968 was consistently rated "adequate," or "above average."

15. On February 12, 1968, plaintiff's position was abolished and plaintiff was separated from service b RIF. The Department of Commerce determined that plaintiff lacked the requisite qualifications to compete for the available engineering positions, citing plaintiff's lack of formal education, training, or experience in the field of engineering. The Department also did not permit plaintiff to "bump," or displace, the incumbents of other physics positions within plaintiff's competitive level, having determined that plaintiff could not have assumed the duties of those positions within 90 days, without causing an undue interruption of the work activity.

16. Plaintiff is not a veteran and, therefore, was not eligible for veteran's preference. At the time of the 1968 reduction in force, plaintiff was serving with career tenure, and classified in retention subgroup IB, with a service credit date of October 14, 1962.

17. In lieu of separation, plaintiff was offered the position of Physicist, GS-1310-5. Plaintiff declined this offer.

18. On January 10, 1968, plaintiff lodged an appeal with the CSC, Denver regional office, challenging his impending separation by RIF. Plaintiff asserted that he was qualified for and should have been considered for assignment to engineering positions occupied by employees with lower retention standing.

19. On March 14, 1968, Mr. Dale C. Gough, Acting Personnel Officer of the Boulder Laboratories of NBS/ESSA, discussed the merits of plaintiff's appeal in a letter addressed to Mr. Charles W. Hoover, the CSC appeals examiner assigned to plaintiff's appeal. The text of that letter is set forth below:

This will refer to your letter of February 23, 1968, in which you furnished a copy of Mr. Ralph Bergman's appeal for our comments.

Mr. Bergman apparently makes two contentions. The first is that his job should not be classified as a Physicist. This claim was answered in my letter to you of February 8, 1968. His second contention is that he should have been rated as an Engineer.

For non-competitive actions we apply the requirements of Announcement DE-7 (1964) issued by the Denver Region on June 29, 1964. That announcement establishes the following as basic qualifications and requires successful completion of one of the alternatives.

A. A full four-year or longer professional engineering curriculum, accredited by the Engineers' Council for Professional Development, leading to a bachelor's or higher degree; or other professional engineering curriculum in a college or university (accredited by a regional accrediting association or by the State University or State Department of Education in the state in which the school is located) substantially equivalent thereto in type, scope, content, and quality.

B. A total of not less than four years of college-level training and/or technical experience of such nature and extent that, taken in conjunction with any private study, they furnished (1) a thorough knowledge of the physical and mathematical sciences underlying professional engineering, and (2) a good understanding both theoretical and practical, of the engineering sciences and techniques and their application to one of the branches of engineering, substantially equivalent to that furnished by a four-year or longer professional engineering curriculum, accredited by the Engineers' Council for Professional Development.

Mr. Bergman was considered not to meet the requirements of either of the above paragraphs. In the first place, his degree is a B.A. (Physics), University of Colorado, 1962. The curriculum followed was not a professional engineering one. Next, the courses taken do not meet the requirements of paragraph B, above. We were, therefore, unable to rate Mr. Bergman eligible as an engineer.

20. Plaintiff was not advised that the agency had submitted the foregoing letter to the CSC appeals examiner, nor did plaintiff learn of the letter's contents until January 1974.

21. On March 29, 1968, the CSC, Denver Region, denied plaintiff's appeal. The decision

letter noted in part:

* * * In your letter of appeal you relate in substance that the Acting Personnel Office for the Environmental Services Administration determined you are not qualified for engineering positions. To resolve this issue the copy of your Application for Federal Employment, Standard Form 57, and other documents showing your experience were rated against the qualification standards for professional engineering positions as set out in Announcement DE-7 (1964) issued by the Denver Region.

* * * * *

The documents reviewed failed to show that your qualifications meet either of the standards * * *. Therefore, it is concluded that you were not entitled to consideration for professional engineering positions when you were reached for separation from your competitive level.

22. On September 26, 1968, plaintiff appealed the March 29 decision of the CSC, Denver Region, to the Board of Appeals and Review ("BAR") of the CSC. However, on October 11, 1968, the BAR declined to accept plaintiff's appeal for adjudication on the basis of untimeliness.

II. Background of the 1973 RIF

23. Following plaintiff's separation from federal employment in February 1968, plaintiff was unemployed for approximately 10 months.

24. In 1965, the General Assembly of the State of Colorado revised the state statutes regulating the licensing and regulation of professional engineers. Revised section 51-1-21(3) provided an exemption from the statutory examination requirements for practicing engineers. This section provides, in pertinent part:

* * * However, prior to June 1, 1967, any resident of the State of Colorado who has attained the age of forty years or over, may apply for registration as a professional engineer, without examination, provided he possesses the qualifications for registration and who shall have a specific record of fifteen years or more of practice of responsible professional engineering; and who shall have been in responsible charge and direction of engineering services and work for at least five years of the fifteen years. * * * (Colorado Revised Statutes, 1966).

25. On the basis of letters of endorsement submitted by Messrs. Lowell H. Tveten, Robert Lawrence, and C. Gordon Little, each of whom had supervised various portions of plaintiff's work at NBS and ESSA, as well as a letter from Mr. Paul F. Hultquist, who had knowledge of plaintiff's work experience prior to federal employment, on April 27, 1968, the Board of Registration for Professional Engineers of the State of Colorado granted plaintiff registration No. 8711, authorizing plaintiff to practice as a professional engineer.

26. In October 1968, plaintiff resumed federal employment in the Boulder laboratories of the Department of Commerce. Plaintiff accepted the position of Physicist, (Atmospheric), GS-1310-11, in the Propagation Predictions Program, Tropospheric Telecommunications Laboratory ("TTL"), in the Institute of Telecommunications, a division of ESSA.

27. The position description for this post is set forth below:

1. ORGANIZATIONAL LOCATION:

This position is that of Physicist, GS-11, assigned to the Propagation Predictions Program area of TTL, ITS/ESSA. This program area conducts and coordinates studies of tropospheric

propagation to develop better methods of predicting the performance of telecommunication systems.

2. TYPICAL DUTIES:

50% (a) The incumbent assists in the definition of critical experiments and in the design of experiments for studying the statistics of propagation and other factors important in the design of mathematical models of telecommunication systems. He assists in the editing, descriptive analysis, and evaluation of data to explain experimental results to the scientific community at large.

20% (b) He develops an understanding of existing mathematical models of radio propagation, terrain, the atmosphere, and radio signal and channel characteristics. Some original extensions of these models are worked out to aid in the investigation of practical problems.

30% (c) He writes, in whole or in part, technical papers and progress reports resulting from his work or from joint efforts with others.

3. SUPERVISORY RELATIONSHIPS:

Supervision received:

The incumbent is under the general supervision of the Program Area Leader. Projects are often assigned without specific instructions as to procedures. Procedural guidelines may be given, but he is responsible for many decisions relating to the project at hand.

Supervision exercised:

He sometimes supervises and co-ordinates the work of subprofessional personnel and occasionally lower-grade professional personnel, especially in data analysis and information retrieval.

4. OTHER:

The major duties of this position concern applications to space research and satellite communications, including both individual research and coordination of other research efforts.

28. The 1976 CSC special inquiry report described plaintiff's duties in this position as follows:

After several months of orientation to the project requirements, the incumbent worked on the initial planning of a proposal for the Radio Interference Propagation Program (RIPP) sponsored by NASA.

The incumbent was directly responsible for coordinating the input of several physicists and engineers in the preparation of an experiment plan and proposal for submission to the project sponsor with the objective of evaluating the physical properties of the scattering of radio waves by rain, and for the engineering aspects of antennas, 4 and 8 GHz (gigahertz) microwave transmission and receiver systems as well as data recording instrumentation.

The incumbent evaluated project requirements, applications, and potential applications, suggested priorities, defined and selected options, determined the need for and feasibility of alternative facilities and techniques and coordinated the work of others both inside and outside of the organization with regard to the RIPP project. The principal requirement of the RIPP project was the design of an experiment plan and measurement program for the study of the scatter of radio waves by precipitation at 4 and 8 GHz. A technical proposal to accomplish this task was required for submission to NASA. Many of the data prediction calculations and "mathematical antenna modeling" were completed prior to the incumbent's assumption of responsibility.

The incumbent was the principal professional employee, directly under the direction of the section chief, for the technical organization and completeness of the experiment plan so that a clear, logical plan could be presented to NASA. The incumbent assisted, along with other project members, in applying mathematical models of antenna beam patterns so that predictions on expected experiment results could be made. The incumbent planned methods to evaluate earth station interference from terrestrial microwave telephone communication systems in order to achieve data verification and validation certainty.

The incumbent was the principal coordinator and author of the work required under the inital stages of the RIPP project and continued in this role until a proposal was submitted to NASA on 8-28-69. The final authority and accountability [sic] was the Section Chief in the first part of the period, and the Section Chief and Mr. Paul Wells in the latter three months of the period. The incumbent received general supervision primarily limited to the review of the progress on the experimental plan.

The incumbent coordinated two proposals to NASA which were not accepted in their total context. NASA provided a request that the measurement plan be modified and resubmitted. At this point, Mr. Wells assumed the responsibility for the principal coordination on the program and the proposal was resubmitted. The incumbent, along with the Section Chief, personally represented the Institute at technical and programmatic meetings involving the project sponsor (NASA) up to the point where Mr. Wells assumed the project leadership.

29. In September 1969, plaintiff was assigned to a new project, known as the Advanced Technology Satellite, Model F, or ATS-F project, which was sponsored by NASA. Plaintiff's official PD

remained unchanged.

30. The 1976 CSC special inquiry report described plaintiff's duties on this project as follows:

Incumbent was assigned as project leader for the NASA-sponsored Advanced Technology Satellite, Series F, project -- known as the ATS-F project. The specific intent of the project was to create a new computer model for evaluating 6 GHz radio interference at synchronous satellite orbit, and Hughes Aircraft Corporation for incorporation onto an automatic data comparison system. The specific tasks of the project included (1) Creation of the model; (2) Integration of AT&T, COMSAT, and ECAC data intc a complete 6 GHz data base for 77,000 microwave radio transmitters for incorporation into computer programs; (3) Improve and simplify the computer prediction model, develop low cost method for producing predictions, computer prediction model, develop low cost method for producing predictions, general predictions for 40 "hot spot" interference locations in the U.S.; (4) pinpoint 6 GHz periscope-type antennas in the United States, Canada and Mexico; and (5) evaluate high gain microwave pencil beam antenna models. This project was essentially an element of the overall Radio Interference Propagation Program sponsored by NASA.

As the project leader, the incumbent was responsible for the overall management and administration of the project rather than the specified detailed analysis and design of the project, with the exception of actually writing the computer programs. The incumbent had available to him mathematicians and computer programmers who provided technical support with regard to the analysis of the magnetic tapes, preparation of program details for generating the predictions, taking data off the tapes, and development of the mathematical models.

The incumbent coordinated these manpower resources in developing the computer prediction program.

The incumbent was responsible for administering the project tasks by defining what was needed from the project point of view, and monitored and assembled the outputs of the programmers, mathematicians, and engineers assigned to the project to produce the desired results.

The incumbent worked with AT&T officials to verify engineering information from several data bases which consisted of magnetic tapes on which all the transmitter data and all the FCC frequency assignments for the 6 GHz band were located. The incumbent coordinated the integration and interface of this data base with the Electromagnetic Compatability and Analysis Center (ECAC) data base which included the development, understanding, and refinement of the data base. In this task, the incumbent contacted, solicited and received data base information from Canada and Mexico. He personally visited Canada and the Republic of Mexico to enlist their governments' cooperation in the project and to make available their 6 GHz data base files for incorporation into the mathematical model.

The incumbent defined experiments for the ATS-F in conjunction with NASA and the project team. He made recommendations on pointing the satellite antenna to several specified regions of the world in which many 6 GHz ground transmitters are assigned, and he delineated schedules to acquire satellite interference data so that actual measurements could be compared with the predictions from the model.

The incumbent was the principal author of the:

o Office of Telecommunications Memorandum 73-158 entitled Advances in Computer Model and

Predictions for ATS-F Radio Frequency Interference Experiment at GHz, dated December 1973.

o Office of Telecommunications Technical Memorandum 197 entitled Mathematical Computer Model and Predictions for ATS-F Radio Interference Experiment at 6 GHz, dated August 1972.

The incumbent was under the general direction of the program area leader (section chief). The incumbent coordinated the work of engineers, mathematicians, computer programmers, on a project basis, in data acquisition and analysis, information retrieval, computer programming and mathematical modeling. The incumbent had the authority to directly contact and visit foreign governments to negotiate for their cooperation in the program and to gather and incorporate their engineering data and the data base information. The incumbent was authorized to confer and consult with NASA, the project sponsor, regarding the project contact, and to represent the Institute at scientific conferences.

1. A new official position description was prepared in June 1972, and is set forth below:

I. Organizational Location

This position is that of Physicist (Engineering) in the new Technology Development Group, Systems Technology and Standards Division of the Institute for Telecommunication Sciences of the Office of Telecommunications located in Boulder, Colorado. This program area is concerned with special projects in the field of telecommunications, including satellite applications.

II. Typical Duties

60% a. The incumbent defines critical experiments in the field of telecommunications. This may require modeling of the problems in order

to make predictions about expected results. The incumbent is expected to utilize his talents in a dual capacity as Physicist and Engineer in order to meet his objectives. He writes and edits technical publications relating to his work and coordinates the writing of others who work under his direction in order to make results available to the sponsors and the technical community.

30% b. He develops an understanding of existing mathematical models of radio propagation, antennas, terrain, the atmosphere, frequency sharing, and radio signal and channel characteristics. Some original extensions of these models are worked out to aid in the investigation of practical problems.

10% c. He develops an understanding of the sociological and economic implications of the impact of the work on the national and international community in order to enable him to define organization goals and objectives. He is expected to attend conferences and seminars pertinent towards meeting his assigned tasks.

III. Supervisory Relationships

Supervision Received: The incumbent is under the general supervision of a Senior Staff member. Projects are assigned without specific instructions as to procedures. The incumbent is expected to work on the Project Leader level and is responsible for the decisions relating to projects at hand.

Supervision Exercised: The incumbent supervises and coordinates the activities of professional and subprofessional personnel. These activities are designed to assist the incumbent in carrying out his assigned tasks.

IV. Other

The major duties of this position concern

applications to communications research, including satellite-oriented communications. The position requires the incumbent to conduct individual research and also to coordinate the research efforts of others. The incumbent is expected to expand his training and education to prepare himself for an expanding role in meeting the mission of the Office of Telecommunications.

32. In July 1972, plaintiff undertook a new work assignment. The new work involved the preparation of an engineering handbook on submarine telephone cable technology. However, an updated position description reflecting this change in duties was not placed into plaintiff's official personnel folder until April 16, 1973. This position description appears below:

I. Organization Location:

This is a full-time temporary position for a period of one year in the New Technology Development Group, Systems Technology and Standards Division of the Institute for Telecommunication Sciences of the Office of Telecommunications located in Boulder, Colorado. The program area for which this position is required is that of underseas cable technology and engineering planning.

II. Typical Duties:

90% a. The incumbent is the project engineer on an Air Force contract to prepare a technical handbook necessary for the engineering planning, specification and procurement of undersea cable systems. The incumbent must have a familiarity with existing cable installations around the world, must be aware of all major cable manufacturing suppliers, design, installation, and maintenance sources throughout the free world. He must have sufficient engineering knowledge and ability to assess available information from the technical literature and from the above industrial

and government sources and to write a concise, coherent handbook which can be used by the DCA and the Tri-Services as an authoritative guide and information source in the planning and procurement of new undersea cable systems.

10% b. The incumbent will represent the Institute and OT on review panels, committees and technical society meetings in presenting and defending the work of the above contract. He will plan and execute the program including the supervision and management of personnel funds and other resources necessary to meet the objectives. He will make any necessary contacts and will travel as necessary to complete the work in a timely manner.

III. Supervisory Relationships:

Supervision Received: The incumbent is under the general suprvision of a Senior Staff member. The project is assigned without specific instructions as to procedures. The incumbent is expected to work on the Project Leader level and is responsible for the decisions relating to the project.

Supervision Exercised: The incumbent supervises and coordinates the activities of professional and subprofessional personnel. These activities are designed to assist the incumbent in carrying out his assigned tasks.

IV. Other:

The incumbent is expected to maintain a close working relationship with the sponsor and be alert to changes, extensions or new work required by the current sponsor. He is also expected to be alert to related or new work from other sponsors in meeting the commitments of the Institute in support of its responsibility ad [sic] a technical resource in the Federal Government.

33. The 1976 CSC special inquiry report described plaintiff's duties on the submarine cable project as follows:

The incumbent was the project leader on the Air Force Communication Service sponsored Undersea Cable Handbook project. The project was established to provide an engineering handbook which would serve to guide planners and engineers in the construction of future undersea cable communication systems for military use. The principal task was to gather information and write an engineering handbook covering (1) terms and definitions; (2) a systems preliminary plan; (3) subsystem design standards; (4) major equipment design; and (5) cable installation standard. The incumbent was responsible for the direction of the preparation of the handbook principally by gathering available information and seeking out restricted material from foreign governments and industry, and producing the output for the handbook. The incumbent was also responsible for requesting and receiving necessary support from the Institute to produce the output, i.e., secretarial and technical support from engineers and scientists within the Institute.

As the project leader the incumbent performed the tasks of research and assembly of engineering data for military and commercial undersea cable system which would be applied in preparation of the engineering handbook. The handbook was to be utilized by undersea cable system planners and procurement activities and as such the task of writing, assembling and editing engineering information for the handbook did not require detailed engineering specifications for single components.

The incumbent was directly responsible for: collecting the data base; defining the data base; assembling data base information into the engineering handbook; and assigning and coordinating the work of senior engineering staff

at the Institute who were assigned to the project on a substantially full-time basis. The incumbent contacted and personally visited large international companies and foreign governments in England and France. He also contacted Germany and Italy to obtain data base information. The incumbent met with an interagency program committee comprised of Air Force and Defense Communication Agency officials in the development of the outline of the required handbook. The incumbent then was assigned the responsibility to develop the detailed background or expansion of the handbook to correspond to the outline.

The incumbent, as the project leader, discussed the requirements and project needs with the sponsor to fully complete the work as required by the sponsor. Following those discussions, an additional $50,000 was procured from the sponsor to complete the handbook. The Institute's administration and procurement offices handled the technical aspects of contract negotiation and other financial responsibilities. However, the incumbent was responsible for the apportionment of the project funds.

The incumbent submitted drafts of the chapters required by the sponsor which dealt with engineering descriptions for submarine cables. These materials, submitted by the incumbent, were used extensively and influenced the author of a related handbook published as a report of the U.S. Department of Commerce, Office of Telecommunication, entitled An Introduction to Undersea Cable Systems. The specific drafts, however, were not directly incorporated in the aforementioned publication.

The incumbent was authorized to directly contact and visit foreign industry and foreign governments under prescribed procedures, to negotiate for their cooperation in the accumulations of the data base for the project, and to receive their contributions toward the

work. The incumbent submitted progress reports to the project sponsor and the Institute on a regular monthly basis as required by the contract.

The incumbent reported directly to the Associate Institute Director, but received general program supervision from the division program manager. The Division program manager was responsible for maintaining contractual relationships with the sponsor; interfacing on a continuing basis with the project leader (the incumbent) to ensure that commitments or program deliverables were met; and assuring that the Institute fulfilled the requirements of the sponsor in implementing the project. The project leader's outputs received occasional technical review from the Associate Institute Director. The incumbent received normal, intermittent supervision. The Institute utilized the group chiefs of the division as senior advisors on the project.

34. On April 25, 1973, as part of an agency-wide reduction in force, plaintiff received a RIF notice informing him that his career tenure position was to be abolished. In lieu of separation, plaintiff was offered a one-year temporary appointment as a physicist, GS-11, to complete the undersea cable engineering handbook. Plaintiff accepted this offer.

35. In conjunction with the April 1973 RIF, the agency prepared a competitive level retention register for all affected competitive levels within the Office of Telecommunications, which included ITS and the Policy Support Division (PSD).

36. On June 28, 1973, plaintiff appealed his separation from career tenure via the April 1973 RIF. Plaintiff's appeal was filed with the Denver regional office of the CSC.

37. On July 27, 1973, while plaintiff's

appeal was pending, the agency cancelled the April 25, 1973, notice of reduction in force and retroactively restored plaintiff to his former position. According to Edgar Hubin, employee relations officer, this action was taken because plaintiff was performing the same duties, at the same grade, series, and salary as he had performed prior to the April 25, 1973, RIF notice. Thus, plaintiff's former position was not truly abolished, rendering plaintiff's separation from career tenure an improper use of RIF procedures. See 5 C.F.R. Section 351.201(a) (1973).

38. Upon receiving notice that plaintiff's notice of reduction in force had been cancelled, the CSC's Denver regional office discontinued adjudication of plaintiff's appeal.

39. On July 31, 1973, the same day that plaintiff received notice that the former RIF action had been cancelled, plaintiff received a second notice that his position had been abolished, and that he would be separated by RIF. This notice further indicated that the agency personnel office had determined that no position existed within plaintiff's competitive area to which plaintiff had a displacement right.

40. At the time of the July 31, 1973, notice of reduction in force, plaintiff was serving with career tenure, and classified in retention subgroup IB with a service credit date of October 14, 1962. Plaintiff is not a veteran and, therefore, does not qualify for veteran's preference. Plaintiff's competitive area comprised the entire Office of Telecommunications (OT) in Boulder, Colorado. Plaintiff's competitive level was Physicist, GS-1310-11.

41. Plaintiff's position was abolished by reorganization. In plaintiff's case, the duties which plaintiff had been performing in connection with the submarine cable handbook project were redistributed among three other agency employees:

Robert Gallawa, Hoke Willis, and Thijs DeHaas. Each of these employees held professional engineering positions within ITS.

42. In lieu of a formally prepared retention register, plaintiff was offered the retention registers which the agency had prepared in connection with the April 1973 RIF. Employee relations officer Edgar Hubin annotated the specific retention register for plaintiff's competitive level to reflect personnel changes occurring as a result of and subsequent to the April 1973, RIF.

43. In addition, plaintiff was offered a computer printout of ITS positions dated August 4, 1973. This list contained the names of ITS employees, a brief title or position designation, the employee's service computation date and retention subgroup classification. The computer printout offered to plaintiff did not contain the names of certain employees working in the Policy Support Division of OT. One such omitted employee was Steven Rosen, Operations Research Analyst, GS-1515-9.

44. In response to plaintiff's request for a current retention register for all competitive levels within OT, plaintiff received a memorandum from Ben Darby, Area Personnel Officer, which noted:

* * * this memo is to confirm our conversation relating to the retention register appropriate for your July 31, 1973 reduction in force letter. I have been advised that, since we are still within the 90-day period for all ITS RIF actions, the original retention register, which you have previously examined, is the basis for your current letter.

45. Plaintiff maintained that the records provided to him were defective, and that the agency's position regarding the retention register

issue was incorrect, since certain employees affected in the April RIF had assumed vacancies in the agency which, according to plaintiff, should have been available for displacement by plaintiff at the time of the July 1973, RIF.

46. Defendant admitted, in response to a request for admissions, that plaintiff was not provided a current, competitive retention register for the July 31, 1973, RIF, as required by Chapter 351, Subchapter 4-6 of the Federal Personnel Manual (FPM) and 5 C.F.R. Section 531-505 (1973).

47. Plaintiff then used the April retention register and the computer printout provided by the agency to indicate a number of positions to which he believed he had displacement rights. However, the agency maintained the position that the July RIF was merely an extension of the April RIF, and informed plaintiff that there were no positions within the agency to which he had displacement rights.

48. Mr. Richard K. Mazeau, plaintiff's expert witness on federal personnel matters, addressed the retention register issue at trial. According to Mr. Mazeau, the retention register is needed by the employee at two stages of the RIF procedure.

The first stage involves the employee's verification that he has been properly released from his competitive level. During the second stage, or "round," of competition, retention registers which list positions in other competitive levels are needed in order that the employee may determine the existence of positions encumbered by employees subject to displacement by the affected employee. According to Mr. Mazeau, the omission of names from the retention register creates a defective register.

49. Plaintiff duly appealed his August 31, 1973, separation by reduction in force on September 7, 1973. Plaintiff's appeal was

received by the Denver regional office of the CSC on September 12, 1973. Plaintiff alleged, inter alia, that:

(1) Plaintiff's position had not been truly abolished;

(2) The agency erred in failing to provide a retention register current at the time of plaintiff's August 31, 1973 separation, and in failing to determine plaintiff's displacement rights as of that date, and that

(3) The agency had retained employees in lower retention subgroups in positions plaintiff was qualified to assume, including the following individuals (among others):

(a) Richard A. Chandler, Electronic Engineer , GS-855-9;

(b) Forrest E. Marler, Electronic Engineer, GS-855-7;

(c) Steven Rosen, Operations Research Analyst, GS-1515-9; and

(d) Donald J. Burch, Electronic Engineer, GS-855-7.

50. Plaintiff, in his initial appeal, did not specifically assert that the position descriptions in his official personnel folder were inaccurate. Rather, plaintiff contended:

Management has apparently acted, in part, upon a basic false statement and assumption which unfairly prevented appellant from competing for lower engineering sub-groups in a 1968 reduction-in-force action wherein the charge was made that appellant's "technical experience was not of such value that it furnished a thorough knowledge of the physical and mathematical sciences underlying professional engineering." This statement was

made by the Civil Service Commission in a letter to U.S. Senator Dominick under date of August 30, 1968, and was never corrected because the appeal was dismissed for failure to file within the allotted time period. * * *

51. On January 7, 1974, George F. Dwyer, director of the CSC Denver regional office, informed plaintiff by decision letter that his appeal had been denied.

52. In regard to the contention that plaintiff's position had not been truly abolished, Mr. Dwyer found that agency management had properly abolished the position by reorganizing and redistributing the duties of the position among three other agency employees.

53. With respect to plaintiff's assertion that the agency erred in failing to provide a current retention register, Mr. Dwyer noted in his decision letter:

Appellant contends that concurrent with the cancellation of the specific notice of April 25, 1973, the agency was obligated to establish a new retention register and determine Mr. Bergman's assignment rights as of August 31, 1973. * * * On the other hand, the agency contends that when the first specific notice was cancelled the agency was still in a reduction in force posture; that Mr. Bergman had no assignment rights under either specific notice dated April 25, 1973, or July 31, 1973; that Mr. Bergman's position was to be truly abolished on August 31, 1973; and that Mr. Bergman had no assignment right to continuing employment and therefore he had to be separated by reduction in force on August 31, 1973. After a careful review of evidence in the record it is concluded that even if appellant's argument concerning the issue of whether the reduction in force continued until August 31, 1973, is valid, there is no evidence to show that his assignment rights would have been greater than on April 25, 1973.

54. The decision letter addressed the question of plaintiff's rights to the Burch, Chandler, and Marler positions as follows:

* * * We are informed that Donald J. Burch, *** Richard A. Chandler, [and] Forrest E. Marler were all reached for separation from their competitive levels in the same reduction in force in which Mr. Bergman was adversely affected. Since they were being separated from their competitive levels, Mr. Bergman was not entitled to go back into the positions from which they were separated. The Commission's reduction in force regulations do not provide an order for which employees separated from competitive levels must be considered for continuing positions. Therefore, Mr. Bergman, regardless of qualifications and retention classification, does not have a greater right to the continuing positions to which these employees were assigned when they were adversely affected.

55. With respect to the Rosen position, Mr. Dwyer noted:

* * * Mr. Bergman was not offered the [position] of Operations Research Analyst, GS-9, occupied by Steven Rosen because the Office of Telecommunications believed the displacement of [Mr. Rosen] by Mr. Bergman would unduly interrupt the activities of the agency. *** In the judgement of responsible operating officials who reviewed the requirements of the positions and Mr. Bergman's qualifications and his experience, it would require *** 24 months of training [for Mr. Bergman] to satisfactorily perform the duties of the position occupied by Mr. Rosen.

56. On January 21, 1974 a formal grievance hearing was held pursuant to 5 C.F.R., Section 771 to examine plaintiff's charges that he had been threatened by agency managers and personnel offices. The hearing examiner concluded that plaintiff's allegations could not be

substantiated.

57. On April 22, 1974, following timely appeal by plaintiff, the Board of Appeals and Review (BAR) rescinded the January 7, 1974, decision of the Denver regional office and remanded the case for further adjudication. The grounds for remand were:

(1) The apparent sole reliance of the regional decision upon the agency's determination that undue interruption would occur if plaintiff were assigned to certain positions, including the Rosen position; and

(2) The regional office's failure to consider plaintiff's assignment rights with respect to certain positions denominated "Part-time," and "Term Appointments (Part-time)."

58. During the period from May 9, 1974 through July 29, 1974, plaintiff was permitted to supplement the appeal record to fully demonstrate his qualifications for the various positions to which he claimed entitlement. The agency (ITS) was afforded the opportunity to comment upon the experience and qualifications claimed by plaintiff.

59. To supplement the record, plaintiff submitted letters of commendation from previous federal supervisors and representatives of project sponsors, certain technical documents to which he had made contributions during various work assignments, two chapters in draft form of the submarine cable handbook on which he had been working prior to separation, position descriptions written by plaintiff detailing his specific duties, and various materials relating to plaintiff's licensure as a professional engineer by the State of Colorado.

60. On July 24, 1974, Joseph A. Hull, ITS Associate Director, submitted a memorandum to

Edgar A. Hubin in which Hull discussed plaintiff's various supplemental submissions to the appeal file. The memorandum contained the following statements:

The recommendations and commendations made by Messrs. Varice Henry NASA/GSFC and F.W. Rodgers, USAF/AFCS are indeed supportive of the good work done by ITS on the contracts in which Mr. Bergman participated as a technical contributor and project engineer. * * *

There is no question that Mr. Bergman has been working on engineering programs during his employment with ITS and that he has contributed to the engineering results of these programs. [emphasis added.]

* * * * *

61. By letter dated July 26, 1974, Frank White Smith, ITS Executive Officer, transmitted the contents of the July 24, 1974, memorandum to Elbert Floyd, FEAA Appeals Examiner. This letter represented the agency's rebuttal to the various statements, letters, and technical documents submitted by plaintiff. However, Smith edited the memorandum to delete the statement emphasized by underlining in finding of fact 60, supra.

62. Mr. Smith also deleted certain statements from the July 24, 1974, memorandum which could be construed as derogatory of plaintiff's professional ability and maturity.

63. On July 29, 1974, Elbert F. Floyd, Chief Appeals Officer of the FEAA Denver Field Office, transmitted the appeal file to Leroy L. Lilly, Chief of the FEAA Staffing Division, and requested an advisory opinion regarding plaintiff's qualifications for the Rosen, Burch, and Chandler positions.

64. On September 3, 1974, Lilly submitted an

advisory opinion addressing plaintiff's qualifications for the foregoing positions.

The advisory opinion noted:

In making our analysis we reviewed the official position descriptions held by Mr. Bergman, the various letters and documents submitted by both Mr. Bergman and the agency contained in [the] appeal file and Mr. Bergman's OPF. We also, of course, make extensive use of the X-118 Qualification Standards.

65. With respect to plaintiff's qualifications for the specific positions n question, the advisory opinion found plaintiff "well qualified" for the position of Operations Research Analyst, GS-1515-9, occupied by Steven Rosen. The advisory opinion also found that plaintiff was "highly qualified" for the position of Electronics Engineer, GS-855-7, occupied by Donald Burch. As for the position of Electronic Engineer, GS-855-9, occupied by Richard Chandler, the advisory opinion noted:

In view of Mr. Bergman's overall background and experience, we believe he can be considered qualified for PD #T-0109.

66. Mr. Lilly's advisory opinion was submitted to the agency and to plaintiff for review and comment on September 9, 1974.

67. By letter of September 20, 1974, Edgar A. Hubin, Acting Personnel Officer (ITS), offered agency comment concerning the advisory opinion.

With respect to plaintiff's qualifications for the Rosen position, the agency argued that insufficient consideration had been given to the agency's position that displacement of Mr. Rosen by plaintiff would result in an undue interruption of the work activity. Specifically, Mr. Hubin's letter noted:

* * * [I]t is evident, therefore, that the advisory opinion failed to take cognizance of, and give due consideration to, the evidence provided earlier by the agency in support of its contention of "undue interruption." Indeed, the agency has not argued that Mr. Bergman was unqualified for this position in terms of basic qualification standards; but that he "did not possess the capacity, adaptability and special skills required for satisfactory performance of the duties and responsibilities of this position without undue interruption to the activity ***." [Emphasis in original.]

Appended to the agency comment letter was a detailed undue interruption statement written by Roger K. Salaman, division chief of the unit in which the Rosen position was located.

68. Mr. Salaman's undue interruption statement provided, in part:

The policy formulation process was in a critical and urgent state at the time of the reduction in force. The position could not have been created or recreated at this time. The policy drafts and white paper were an integration and culmination of the previous 12 months study of the technical options, political environment, economic tradeoffs, and institutional implications; and integration of meetings, analytical analyses, concepts, political pressures, and Administrative philosophy which cannot be passed, but must be experienced.

Even in hindsight, it is clearer than ever that substitution of another fully qualified Operations Research Analyst without the specific background in home warning would have resulted in undue interruption of a critical study involving the highest national interests. [Emphasis in original.]

69. At trial, plaintiff testified that the undue interruption statement filed by the agency

in regard to the position of Operations Research Analyst, GS-1515-9, occupied by Steven Rosen, was a "snow job to the Civil Service Commission." According to plaintiff,the undue interruption statement was based on the assertion that plaintiff was unfamiliar with home warning systems. Plaintiff testified that the home warning system in question was merely a "$35 radio receiver which was placed in the home, which you would tune to the weather forecast."

70. In regard to the positions of Electronic Engineer, GS-855-9, occupied by Richard Chandler, and Electronic Engineer, GS-855-7, occupied by Donald Burch, the agency comment letter indicated that the position descriptions submitted by the agency in connection with these positions were incorrect. Both Chandler and Burch were affected by the agency-wide reduction in force occurring in April 1974, and were placed in new positions with changed position descriptions. Accordingly, the agency submitted new position descriptions for consideration by the FEAA.

71. In order that plaintiff's qualifications for the Chandler and Rosen positions as correctly described could be determined, the record was reopened on September 30, 1974, to secure a second advisory position on plaintiff's qualifications for these positions.

72. The second advisory opinion on plaintiff's qualifications was filed by Leroy L. Lilly, Chief of the FEAA (Denver region) Staffing Division, on November 5, 1974. Before discussing in detail plaintiff's qualifications for the positions in question, Mr. Lilly discussed the sources of information upon which his opinion was based:

The agency contends that since Mr. Bergman's registration as a professional engineer was under a "grandfather" clause and was based on references by his Federal supervisors and his Federal

position descriptions, that it should not be considered as qualifying at the Grade 5 level. There is no equivocation of this

We also have to assume that Mr. Bergman's position descriptions were accurate and that his former Federal supervisors are competent individuals who are capable of making authoritative judgements about the nature and quality of Mr. Bergman's work. We believe that the decision to grant Mr. Bergman professional engineering registration on the basis of his Federal positions and references confirms our own analysis that his work in the Federal service contained elements of both engineering and physics.

73. With respect to the position of Operations Research Analyst, GS-1519-9, occupied by Steven Rosen, the advisory opinion found plaintiff qualified for the position, but that a "considerable period of time *** (in excess of six months)" would be required for plaintiff to become fully proficient in the position.

74. The correct position description for the position of Electronics Engineer, GS-855-09, encumbered by Richard Chandler, is set forth below:

1. Organizational Location

This position is that of electronic engineer (instrumentation) located in the Applied Electromagnetic Science Division, ITS, Boulder, Colorado. This section performs research concerning channel characteristics and electromagnetic properties of the atmospheric propagation medium at microwave and millimeter-wave frequencies.

2. Typical Duties

The incumbent is assigned to the "Automatic

Radar Braking System" project sponsored by the Department of Transportation. The duration of this project is at least to June 30, 1974, with possible extension beyond that time.

65% (a) The incumbent designs, lays out, constructs, and operates digital and microwave equipment in the laboratory. He is expected to do complex and in some cases original design of components and subsystems. For example, using solid-state hybrid techniques, he fabricates the necessary interface units between digital channels and a digital tape recorder, and puts the complete digital data acquisition system, including the time-shared computer and software into operation. Items to be designed and built are described in general as to function, with the incumbent purchasing necessary parts and supplying the design and fabrication. The incumbent must be familiar with X-band and MM Wave Radar Systems, their design, construction and operation as they pertain to highway automotive uses.

25% (b) The incumbent operates and maintains research equipment in the laboratory. For example, he is responsible for the maintenance of the new microwave radar system, performs data runs and assists with the data reduction and analysis. The incumbent also performs periodic calibrations of expensive, complex laboratory equipment used in experiments. He is required to install the radar equipment in furnished vehicles and helps make data runs locally and pattern testing at the Air Force Systems Command Radar Scattering Test Facility at Holiman AFB, New Mexico.

10% (c) The incumbent familiarizes himself with precision mechanical design problems associated with automotive radar systems and components. He maintains liaison with the NBS instrument shop for the mechanical work of the experiment.

3. Supervisory Relationships

a. Supervision received: Supervisor discusses the general nature of assignments, pointing out immediate objectives and the nature of results to be expected. Elements of difficulty and reference sources are clarified as the need arises. Incumbent is responsible for the accuracy and completeness of his work, the application of standard methods of techniques, and proper application of modified methods adapted from professional literature or devised as the result of collaborative efforts within the group. Technical guidelines normally do not apply directly to work assignments, so that judgement is required in the application of basic principles to the requirements of a given problem. Incumbent is expected to plan an approach to assigned problems; to determine the sequence of steps and the need for and methods of checking approaches and results; to understand the limitations of computing equipment; to select and evaluate the applicability and limitations of various approaches to assigned problems; and to exercise professional judgement in the interpretation of final results.

b. Supervision Exercised: Incumbent advises and assists members of the Section. In performing these duties, the incumbent supervises one or more Technicians up to GS-9 level, who may be assigned for the duration of a project.

4. Other

Incumbent has extensive contacts with engineers and scientists, both within and outside ITS. He maintains cognizance of new advances of technology so the latest innovations can be utilized in improving research methods for accurate millimeter wavelength propagation parameters. This is done by means of library research, contacts with sales representatives and colleagues, and attendance at technical seminars and meetings.

75. The findings of the advisory opinion concerning plaintiff's qualifications for the Chandler position are as follows:

The duties of this position include:

- design, lay-out, construct and operate digital and microwave equipment in the laboratory

- familiarity with X-band and MM Wave Radar Systems, their design, construction and operation as they pertain to highway automotive uses

- operate and maintain research equipment
- become familiar with precision mechanical design problems associated with automotive radar systems and components.

The incumbent of this position can be expected to operate above the entry level of GS-5/7 and below the journeyman level of GS-11/12.

In making this evaluation, we considered the additional information submitted by the agency, Mr. Bergman's experience, and in addition, we consulted an expert in the field.

Mr. Bergman's record shows no experience in radar ranging, digital interface equipment, digital tape recording, X-bank, MM wave or automotive applications. While Mr. Bergman's previous experience would probably enable him to operate the equipment involved, maintenance of the equipment would require significant training. Mr. Bergman would need considerable knowledge of vehicular systems before being able to install, operate, etc.

In our opinion, Mr. Bergman is not qualified for the position of GS-855-09, Electronic Engineer, PD T-0245.

76. Richard K. Mazeau, a former director of personnel and former chief of the Classification

and Pay Management Division of the Maritime Administration, Department of Commerce, testified in plaintiff's behalf as an expert witness on personnel matters. Mr. Mazeau possessed no formal education or work experience in the areas of physics, electronics, or engineering. Mr. Mazeau testified that he had gained some experience in classification of engineering positions.

Mr. Mazeau testified that, in his opinion, plaintiff was qualified to displace Richard Chandler as the incumbent of the position of Electronic Engineer, GS-855-9. Mr. Mazeau did not detail the basis for this opinion, nor address the specific deficiencies in plaintiff's experience cited in the FEAA advisory opinion, and by the FEAA appeals examiner.

77. At trial, plaintiff addressed the issue of his qualifications for the Chandler position. Plaintiff testified that previous experience gained in assembling and operating high frequency and very high frequency laboratory equipment fully qualified him to undertake the duties of the Chandler position, which related to the construction, operation, and maintenance of equipment operating at higher microwave frequencies. Plaintiff emphasized the "very, very minor differentiation" between his previous work and the work detailed in the Chandler position description, concluding that "*** as far as typical laboratory electronics work, it's all the same."

78. In addition, plaintiff testified that each of the projects to which he had been assigned in the period between 1968 and 1973 "related" to microwave frequencies. However, plaintiff did not address the specific deficiencies cited by Mr. Lilly in the advisory opinion of November 5, 1974 (see finding 72), which included a lack of experience in "radar ranging, digital interface equipment, digital tape recording, X-band [microwave radar], MM wave [millimeter wave], or automotive applications."

79. A review of the record, particularly the CSC special inquiry report, discloses that between June 1965, and June 1967, plaintiff designed and constructed a radio-linked servo feedback system which operated at a frequency of approximately 150 megahertz. This frequency lies immediately below the frequencies commonly referenced as microwave frequencies, which range upwards from approximately 500 megahertz.

80. In addition, the record discloses that plaintiff assisted in the preparation of a proposal for evaluating the scattering of 4 and 8 gigahertz microwave signals by atmospheric precipitation. In another project, plaintiff designed computer models and managed the data base on a computer model evaluation of 6 gigahertz radio interference at synchronous satellite orbit.

81. The record does not disclose that plaintiff possessed any prior experience in actual operation and maintenance of strictly microwave equipment, signal data processing programming, radar ranging, digital interface equipment, digital tape recording, or automotive radar applications.

82. William F. Utlaut, Deputy Director of IT at the time of plaintiff's August 31, 1973, separation by RIF, submitted a letter to the FEAA on September 20, 1974, in which the requirements of the Chandler position, and plaintiff's qualifications were discussed. The letter provided in part:

* * * As the advisory opinion *** notes, Mr. Bergman has not been specifically concerned with microwave. *** T-0245 [the Chandler position description] require[s] experience in "distributed" parameter circuit design, at very high, microwave, and millimeter wave frequencies. In contrast, Mr. Bergman's experience in radio, as reflected in his own position descriptions, is at much lower frequencies (HF and VHF) where "lumped"

parameter circuits are used. There are great differences in technology and required training between these portions of the electromagnetic spectrum, which has profound impact upon an engineer's ability to effectively design and evaluate the circuits and systems required * * * for the "Automatic Radar Braking System" project.

83. At trial, Dr. Utlaut, currently director of ITS, testified that, in his opinion, plaintiff was not qualified as an electronics engineer beyond the GS-7 level.

84. Mr. Lilly's second advisory opinion again found plaintiff "highly qualified" for the position of Electronics Engineer, GS-855-07, occupied by Donald Burch.

85. On January 24, 1975, Elbert F. Floyd, Chief Appeals office, of the FEAA Denver Field Office, transmitted his analysis, findings, and decision regarding plaintiff's appeal. The decision recommended that plaintiff be offered the position of Electronic Engineer, GS-855-07, part-time, occupied by Donald J. Burch, or any other position "with a rate of pay of GS-7 with a weekly work schedule of at least 25 hours for which he is qualified."

86. The decision held that plaintiff's position had been properly abolished and that the duties of the position performed by plaintiff had been redistributed among three other agency employees, Thijs Dehaas, Robert L. Gallawa, and Hoke Willis.

86. In regard to plaintiff's contention that the agency had erred by failing to provide a retention register current to the August 31, 1973 RIF, the decision indicated:

The appellant's next contention is that concurrently with the cancellation of the specific

notice of April 25, 1973, the agency was obligated to establish a new retention register and determine his assignment rights as of August 31, 1973. The agency contends that when the first specific notice was cancelled the agency was still in a reduction in force posture and that the appellant had no assignment rights under either notice dated April 25, 1973 or July 31, 1973. The appellant has introduced no evidence to show that his assignment rights would be greater on August 31, 1973, than on June 30, 1973. Accordingly, his assignment rights will be determined as of June 30, 1973.

88. The FEAA decision indicated that plaintiff was not offered the position of Electronic Engineer, GS-7, occupied by Forrest E. Marler, classified in retention subgroup II-B, because Marler had been assigned to a vacant position through the reduction in force on June 30, 1973. According to the FEAA, "there is no requirement that the agency fill vacancies, and [plaintiff] had no right of assignment to the position."

89. With respect to the actual retention subgroup of Marler, the FEAA decision was in error. Marler had been upgraded from retention subgroup II-A (career conditional status) to retention subgroup I-A on July 12, 1973. As a I-B, plaintiff had no right of displacement to positions encumbered by employees in retention group I-A.

90. In regard to the issue of plaintiff's displacement rights vis-a-vis the Burch, Rosen, and Chandler positions, the FEAA opinion adopted and incorporated the findings and conclusions set forth in the advisory opinion of November 5, 1974, prepared by Leroy L. Lilly.

a. Plaintiff was found qualified for the position of Electronic Engineer, GS-855-7, occupied by Donald J. Burch.

b. Plaintiff was found qualified for the position of Operations Research Analyst, GS-1515-9, occupied by Steven Rosen, but the FEAA decision concluded that an undue interruption of the work activity would occur if plaintiff assumed Rosen's position.

c. Plaintiff was found not qualified for the position of Electronic Engineer, GS-855-9, occupied by Richard Chandler.

91. The FEAA decision also addressed the question of accuracy of plaintiff's official position descriptions. The decision noted:

The appellant contends that official position descriptions covering his employment with the Department of Commerce from about October 1962 forward did not accurately and fully reflect his duties and responsibilities. We did permit the appellant to supplement the record concerning his claimed experience and we provided that information, with agency comments, to the Denver Regional office for consideration in determining the appellant's qualifications for positions to which he claimed displacement rights. There is no information in the record that the appellant has ever filed a classification appeal to the Commission in relation to any of his positions with the Department of Commerce.

92. On February 5, 2975, the agency appealed the decision of the FEAA Denver appeals examiner to the CSC's Appeals Review Board (ARB). The agency contended that the position which the appeals examiner had recommended the agency offer plaintiff was a vacancy which had been filled as a result of the previous RIF, and therefore did not constitute a proper offer.

93. By letter of February 12, 1975, plaintiff also indicated dissatisfaction with the decision of the FEAA appeals examiner. In particular, plaintiff contested the finding that an undue

interruption would occur if plaintiff assumed the position of Operations Research Analyst, GS-1515-9, occupied by Steven Rosen. Plaintiff reasserted his claim that his position had not been truly abolished, and contended that the preparer of the advisory opinion had relied excessively upon inaccurate official position descriptions in assessing plaintiff's qualifications.

94. Plaintiff also filed a document titled "Summary Argumentation of Appellant" with the CSC's Appeals Review Board on February 12, 1975. In the context of a discussion of the appropriateness of the competitive level in which plaintiff was permitted to exercise displacement rights, the following statement appears:

While Appellant [plaintiff] does believe that the competitive level was too narrow, or at least inappropriate, in that he should have been placed in a level of engineers and not of physicists, this error did not affect his substantive rights because, in the appeals process, he has been given consideration for all positions within the competitive area for which he might have had assignment rights.

95. On July 14, 1975, the ARB issued a decision affirming the prior decision of the Denver Field Office of the FEAA. In regard to the specific contentions of the parties, the ARB determined that:

a. The FEAA had correctly recommended that the agency offer plaintiff the position of Electronic Engineer, GS-855-7. This represented a proper offer, since the position was not vacant at the time of plaintiff's August 31, 1973, separation by RIF.

b. Plaintiff's position was properly abolished by reorganization and redistribution of the duties and responsibilities among other agency employees.

c. Plaintiff failed to overcome the agency's argument that an undue interruption of the work activity would result if plaintiff assumed the position of Operations Research Analyst, GS-1515-9, occupied by Steven Rosen.

d. The FEAA did not err in adopting the conclusion of the advisory opinion that plaintiff was not qualified to assume the position of Electronic Engineer, GS-855-9, occupied by Richard Chandler.

e. The FEAA was correct in its finding on all of the relevant aspects of the reduction-in-force action in which plaintiff was affected.

96. On August 12, 1975, plaintiff was offered the position of Electronic Engineer, GS-855-7, as recommended by the CSC. Plaintiff accepted this position, his separation by RIF was cancelled, and back pay and other benefits were restored for the period beginning September 1, 1973.

97. Plaintiff continued to file grievances and appeal through agency and CSC channels, alleging mistreatment and error in the previous determinations of the FEAA and ARB.

98. As a result, the Denver Regional Office of the CSC initated a "special Inquiry Into the Employment History of Mr. Ralph R. Bergman," in July 1976. The regional office issued its report on November 6, 1976.

99. As noted in a cover letter accompanying the report, the inquiry was initated in response to allegations by plaintiff that his past job descriptions did not correctly describe the actual duties, assignments, and responsibilities performed by plaintiff during his employment with the Department of Commerce.

100. The cover letter, which was transmitted to Douglas D. Crombie, ITS Director, contained the

following statements regarding the purpose of the report:

The purpose of the special inquiry was to obtain specific information to determine the exact nature of the duties, assignments, and responsibilities performed by Mr. Bergman during his employment with the Department of Commerce since 1962.

* * * * *

The review was not conducted to evaluate the propriety of Mr. Bergman's separation as a result of two reduction-in-force actions, nor was the review conducted as a result of a classification appeal. ***

101. The special inquiry report contains nine duty statements which supplement, modify, or amplify the official descriptions contained in plaintiff's official personnel folder. The duty statements contained in the special inquiery report were prepared by examining plaintiff's official personnel record, contacting past and present supervisors, and associates, reviewing the documentation supplied by plaintiff relating to past duties, and examining statements of duties and responsibilities as recalled by plaintiff.

102. In a separate letter dated November 5, 1976, which also accompanies the report to Mr. Crombie, Mr. Dwyer set forth his conclusions regarding the adequacy and accuracy of plaintiff's official position descriptions:

With regard to Mr. Bergman's allegation that his official work record promulgated by local agency officials did not correctly describe his actual duties and responsibilities, our review of Mr. Bergman's past job descriptions indicated that those position descriptions were extremely broad and general statements of the principal duties and responsibilities performed by Mr. Bergman,

exception T-0259, dated 4-23-73, for Physicist GS-11.

After citing the standards for adequacy set forth at Chapter 511, Subchapter 4-2(a), Mr. Dwyer further concluded:

* * * The position descriptions covering Mr. Bergman's employment history clearly did not meet this standard for adequacy as the position descriptions did not (1) clearly and definitely describe the principal duties and responsibilities of the positions -- specifically those which were operative during a substantial part of the time and others which affected the qualifications required to perform the work; and (2) the position descriptions did not define the nature and extent of the responsibilities in the position as it actually operated.

Mr. Dwyer concluded this letter by directing Mr. Crombie to incorporate the duty statements contained in the special inquiry report into plaintiff's official personnel folder.

103. After receiving the special inquiry report, plaintiff petitioned the Commissioners of the CSC to reopen and reconsider the final decision of the ARB with respect to plaintiff's August 31, 1973, separation by reduction in force. Despite the findings of the Denver regional office, the Commissioners declined to reopen the case. Robert B. Bates, Assistant to the Commissioners (Appeals) contacted plaintiff by letter of February 24, 1977, and noted:

With regard to the July 14, 1975 decision of the Appeals Review Board, the file shows that the issues of this appeal were fully considered by the Appeals Review Board and discussed in its decision. We find that your submissions are not sufficient to indicate error in the findings or decision of the Appeals Review Board. *** We concur in the analysis and findings and decision

of the Appeals Review Board. Therefore, in the absence of any new material evidence not readily available at the time of the decision of the Appeals Review Board sufficient to indicate error in the findings of the Appeals Review Board, the request to reopen the July 14, 1975, decision must also be denied.

104. Following reinstatement, plaintiff received no assignments other than directions to read certain manuals, and performed no asertainable duties, tasks, or projects until approximately February 1976.

105. In February 1976, plaintiff was assigned to the Methodology and Operations Research Group of the Office of Telecommunications, ITS. Plaintiff commenced work on a project which was described by the CSC special inquiry report as "[r]eview of continuous system simulation, circuit models, and intrasystem energy coupling model documentation and exercise [of] sample computer programs so as to achieve a minimal level of capability for solving hypothetical engineering problems."

106. Following this assignment, the CSC special audit report described plaintiff's next assignment as "[r]eview of basic texts on coherent detection receiver systems and development of preliminary sensitivity specifications relating performance parameters to various input signal characteristics and external and system noise for phase lock loops."

107. However, neither assignment produced satisfactory results. Plaintiff testified that these tasks represented "assignments that could not be carried out. I was limited with the tools that I was given and it was one of the most frustrating experiences to not be able to execute work properly."

108. Plaintiff testified that, following his

experience with the prior two tasks, he was assigned the duty of plotting the latitude and longitude of all railroads in the United States in 5-mile increments. Plaintiff described this task as "[a]n absolute tedious routine task, with absolute zero creativity."

109. Plaintiff experienced increasing health difficulties, and testified at trial that his frustration with his work assignments had contributed to his health problems.

110. After being advised by the agency physician that advanced sick leave would not be granted, plaintiff applied for disability retirement in December 1976.

111. Plaintiff retired for disability in March 1977.

112. In response to a complaint directed by plaintiff through Department of Commerce channels, Ms. Elsa A. Porter, Assistant Secretary of Commerce for Administration, directed the Office of Audits, Department of Commerce, to conduct a review of two contentions of plaintiff relating to the 1973 RIF. By order dated July 21, 1977, Ms. Porter directed the Office of Audits to determine if plaintiff's position was misclassified at the time of the 1973 RIF, and if so, whether the RIF was invalid due to plaintiff's eligibility for the retention register for electronic engineers, rather than the retention register for physicists. In addition, Ms. Porter requested a review of plaintiff's allegation that the letter prepared by Frank White smith for submission to the FEAA (see finding 61) was intended to mislead the FEAA regarding the extent of plaintiff's electronic engineering qualifications.

113. On September 2, 1977, the Office of Audits released its report. The report was based upon a review of ITS and CSC files relating to plaintiff's various appeals, grievances, and

complaints, as well as certain documents submitted by plaintiff in support of his allegations of misclassification and official misconduct. In addition, employees of the Office of Audits interviewed "appropriate Department officials," who were not identified in the report, and plaintiff.

114. In regard to the misclassification question, the Office of Audits report concluded:

* * * Mr. Bergman was improperly listed on the 1973 RIF retention register as being in a competitive level for physicists rather than electronic engineers. As a result, Mr. Bergman may have been placed at a disadvantage in the RIF action. We were advised that regardless of classification, Mr. Bergman's job was identified for abolishment, and electronics engineering positions for which he had possible assignment rights were also abolished. We did not attempt to verify this statement, because we believed we could not accomplish it with certitude.

As for the allegation that agency officials had deliberately misrepresented plaintiff's engineering abilities and qualifications, the report stated:

* * * ITS officials, in a rebuttal letter to the Federal Employee Appeals Authority (FEAA), CSC, dated July 1974, omitted pertinent facts favorable to Mr. Bergman's appeal and shifted the emphasis commending Mr. Bergman's work from Mr. Bergman to ITS.

* * * * *

In our opinion, these omissions occurred because agency officials were functioning in an adversary role and may have been too vigorous in their rebuttal to Mr. Bergman's allegations. Therefore, facts favorable to Mr. Bergman's allegations, if presented in a straight forward

manner by the agency, may have resulted in a 1975 CSC decision more favorable to Mr. Bergman. The Director, ITS, stated that he did not believe the changes made by Mr. Smith were relevant to whether Mr. Bergman was qualified as an Electronic Engineer or that changes were made with malicious intent. Mr. smith said that his vigorous rebuttal was his proper role as Executive officer, ITS.

115. By letter of October 25, 1977, Ms. Porter advised plaintiff that the Department of Commerce could afford him no relief for his alleged mistreatment. The text of that letter is set forth below:

I have reviewed the report of the Office of Audits concerning the reduction-in-force actions affecting your past employment with the Department. I understand that you have a copy of the report.

I have been advised by legal counsel that the Department has no authority to grant monetary relief to employees in circumstances like yours. Agencies cannot retroactively classify positions and cannot pay the legal or other expenses of employees arising out of their personal efforts to obtain redress for grievances.

Insofar as it can reasonably be done at this time, I have had the 1973 reduction-in-force reconstructed. It appears clear from this that you would have been similarly affected by the 1973 RIF if you had been classified as an Engineer at the time. You may find the enclosed copies of records useful in understanding this.

As you know, the November 1976 report of the Denver Region Civil Service Commission office was placed in your official personnel folder file, to show for all future record purposes what work you did and what professional skills you employed. I see no need to take any further action concerning this aspect of your employment.

The audit report discloses clearly, in my judgement, that the contents of the Smith letter to the appeals authority was deliberately deceptive and intended to mislead the appellate office. I will not condone such action by any official in the Department. You may wish to consider bringing this part of the audit report to the attention of the appeals authority.

I deeply regret that your efforts to obtain recognition for your engineering work have taken so long to be realized. I believe you would be justified in drawing some measure of satisfaction from the success of your efforts thus far. I am sorry that more canrot be done.

116. On March 13, 1978, plaintiff filed suit in the United States Court of Claims.

CONCLUSION OF LAW

Upon the findings and foregoing opinion, which are adopted by the court, the court concludes as a matter of law that plaintiff is not entitled to recover and the petition is dismissed.

APPENDIX B

Direct quotation of:

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT
DECISION OF JANUARY 10TH,1983:

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest.It is the public record.It is not citable as precedent. the decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RALPH ROGER BERGMAN,
APPELLANT,

V.

UNITED STATES,
APPELLEE,

APPEAL NO.84-78

DECIDED JANUARY 10,1983

before FRIEDMAN,BALDWIN,and SMITH, Circuit Judges..

SMITH,, Circuit Judge.

DECISION

The Judgement (see footnote) of the United States Claims Court denying appellant relief on his claims for back pay and reinstatement is affirmed.

(footnote) Pursuant to order of this court dated October 4,1982,Judge Seto entered a judgement on October 8,1982,corresponding to the decision recommended in this case.

OPINION

Appellant challenges a series of personnel actions taken by his employer, the Department of Commerce,during the course of his career as a federal employee. His first claim is based on a February 1986 reduction in force, as a result of which he was separated from his position as a physicist,GS-11. Eight months later he obtained a new position as a physicist (atmospheric) ,GS-11.The second claim arises from another reduction in force,in April 1973. This time, in lieu of separation,appellant was offered a temporary appointment.The agency,however, decided that the temporary position was identical to the abolished permanent one, renewed the reduction in force as to appellant, and separated him in August 1973.Appellant challenged both the 1968 and the 1973 separations before the Civil Service Commission, which denied relief.In August 1975 Appellant was reinstated to the position of electronics engineer, GS-7. Due, he alleges,to unsatisfactory work assignments, appellant became ill and took a disability retirement in March 1977. His third claim is that the retirement was not voluntary. He raised the claim in the Court of Claims without having appealed first to the Civil Service Commission.

The judgement of the Claims Court denied all of appellant's claims.The 1968 action,it held,was barred by the applicable 6 year statute of limitations.While noting some procedural defects in the agency's 1973 reduction in force,the trial court also denied relief as to that claim on the ground that the Civil Service Commission decision upholding the separation was not arbitrary, capricious,an abuse of discretion,contrary to law,or unsupported by substantial evidence. Finally, the trial court held that appellant failed to exhaust his administrative remedies with respect to the retirement claim.

The trial judge's opinion is lengthy and detailed,

and it addresses completely all of the claims raised by appellant. Finding no material error in the opinion, we affirm, based on the reasoning stated therein.

This leaves for our consideration only appellant's six allegations of procedural error by the trial judge. We find them all to be without merit.While the decision to quash supeona to the representatives of the Office of Personnel Management and the Merit Protection Board was late in the game, we see from the record that appellant had an opportunity to respond to the motion to quash and that he pointed to no testimony from the witnesses which would have added materially to his case. (Having no personal knowledge of appellant's case, the witnesses were to testify concerning the laws and regulations they administer.) Appellant's objections to the denial of testimony of other witness fail for the same reasons; he does not point to any testimony that would have been presented which might have added materially to his case. Likewise we do not find harmful error in the refusal to consider appellant's response to employment records of Mr. Marler, the authenticity of which appellant did not contest. The trial judge's other efforts to limit proof in the case were reasonable and do not provide a basis for reversal.

Appellant represented himself throughout this litigation and,while the record shows occasional difficulties below on account of his lack of legal training,we feel bound to state that Mr.Bergman aquitted himself very well before this court,in his briefs, and particularly at oral argument. Though unsuccessful, his submissions added materially to our understanding of the case.We affirm the Claims Court but order costs not be taxed to appellant.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DENIAL OF PETITION FOR REHEARING AND PETITION FOR HEARING EN BANC, ISSUED MARCH 17, 1983

United States Court of Appeals for the Federal Circuit

Ralph Roger Bergman Appellant	)	Case 84-78
v.	)	
United States Appellee	)	

ORDER

A suggestion for rehearing en bank and a petition for reconsideration having been filed in this case.

UPON CONSIDERATION THEREOFF, it is hereby ordered by the court that the suggestion for rehearing en banc and the petition be, and the same are hereby denied.

FOR THE COURT

George E Hutchinson

_____

Clerk.

March 17, 1983 (date)

APPENDIX D
STATUTORY AND REGULATORY PROVISIONS INVOKED.

UNITED STATES CODE, TITLE 5 :

Section 3502 of Title 5, United States Code in effect at the time of the action complained of provided:

3502. Order of Retention

(a) The Civil Service Commission shall prescribe regulations for the release of competing employees in a reduction in force which give due effect to-

(1) tenure of employment;
(2) military preference,subject to section 3501(a)(3) of this title;
(3) length of service; and
(4) efficiency or performance rating.

* * * *

(b) A preference eligible employee whose efficiency or performance rating is "good" or "satisfactory" or better than "good" or satisfactory is entitled to be retained in preference to other competing employees.A preference eligible employee whose efficiency or performance rating is below "good" or "satisfactory" is entitled to be retained in preference to competing non-preference employees who have equal or lower efficiency or performance ratings.

CODE OF FEDERAL REGULATION, TITLE 5:

Section 351 of Title 5,C.F.R.,in effect at the time of the action complained of, provided:

Part 351-REDUCTION-IN-FORCE

* * * *

Section 351.201 Use of regulations:

(a) Each agency shall follow this part when it releases a competing employee from his competitive level by separation,demotion,furlough for more than 30 days,reassignment requiring displacement, when the release is required because of lack of work, shortage of funds, reorganization, reclassification due to change in duties, or the exercise of reemployment rights or restoration rights.

Section 351.303 of Title 5, C.F.R.,in effect at the time of the action complained of, provided:

Section 351.303 Definitions:

In this part:
(a)"Competing Employee" means a employee in tenure group I,II,or III.

* * * *

(g)"Reorganization" means the planned elimination, addition, or redistribution of functions or duties in an organization.

Section 351.401 of Title 5, C.F.R.,in effect at the time of the action complained of, provided:

351.401 Determining Retention Standing:
Each agency shall determine the retention standing of its competing employees on the basis of the selection factors in Subpart E of this part.

Section 351.402 of Title 5, C.F.R.,in effect at the time of the action complained of, provided:

351.402 Competitive area:
(a) Each agency shall establish competitive areas in which employees compete for retention under this part.

Section 351.403 of Title 5, C.F.R.,in effect at the time of the action complained of, provided:

351.403 Competitive Level:
(a) Each agency shall establish competitive levels consisting of all positions in competitive area ... .

Section 351.404(a) of Title 5, C.F.R.,in effect at the time of the action complained of, provided:

351.404 Retention Register:
(a) Each agency shall establish a separate retention register from the current retention records of competing employees ... .

Section 351.501(a) of Title 5, C.F.R.,in effect at the time of the action complained of, provided:

351.501 Tenure groups and subgroups--competitive service:
(a) Each agency shall classify the competing employees on a retention register who occupy positions in the competitive service in the following groups and subgroups on the basis of tenure of employment and veteran's preference.The decending order of retention standing:

(1) By group I,group II,group III;
(2) With each group is subgroup A and subgroup B; and
(3) Within each subgroup begins with the earliest service date.

Section 351.505 of Title 5, C.F.R.,in effect at the time of the action complained of, provided:

351.505 Records:
Each agency shall maintain the current,correct records needed to determine the retention standing of its competing employees.The agency shall allow the inspection of its retention registers and related records by:

(a) A representative of the Commission; and
(b) An employee of the agency to the extent the the registers and records have a bearing on his case.

Section 351.506 of Title 5, C.F.R.,in effect at the time of the action complained of, provided:

351.506 Effective date of retention standing:
Except for determining additional service credit for performance ratings as provided in SS 351.504:

(a) The retention standing of each employee released from his competitive level in the order prescribed in SS 351.602 is determined as of the date he is so released.

Section 351.601 of Title 5, C.F.R.,in effect at the time of the action complained of, provided:

351.601 General:

An agency may not release a competing employee from a competitive level while retaining in that level an employee with a specific limited temporary appointment, a specific limited temporary promotion,or an "Unsatisfactory" performance rating. It may not release a competing employee from a competitive level while retaining in that level an employee with lower retention standing except as required under SS 351.606 or SS 351.607 and SS 351.608.

Section 351.602 of Title 5, C.F.R., in effect at the time of the action complained of, provided:

351.602. Order of release from competitive level:
Each agency shall select competing employees from a competitive level under this part in the inverse order of retention standing, beginning with the

employee with the lowest retention standing as required under SS 351.606 or SS 351.806 or as permitted under SS 351.607 and SS 351.608.

JURISDICTIONAL AUTHORITY:

UNITED STATES CODE, TITLE 28, SS 1254 states in pertinent part:

1254. COURTS OF APPEAL; CERTIORARY; APPEALS; CERTIFIED QUESTIONS.

Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorary granted upon the petition of any civil or criminal case, before or after rendition of judgement or decree;

(2) ...
(3) ...